82-6483
Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vernon Thaddeus Taliaferro respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Appeals of Maryland in Taliaferro v. State, ____ Md. ____, ____ A.2d ____ (No. 101, September Term, 1981, decided February 10, 1983).

QUESTION PRESENTED

Did the trial court's ruling that Petitioner's sole witness would not be permitted to testify as a result of lack of compliance with Maryland's "notice of alibi" rule constitute a denial of due process and the right to compulsory process for obtaining witnesses where the record affirmatively reflected that any prejudice to the prosecution could be obviated by a short continuance?

TABLE OF CONTENTS

	Page
Question Presented	1
Statement of Grounds for Jurisdiction	3
Pertinent Constitutional Provisions and Rule	3
Statement of the Case	4
Reasons for Allowance of the Writ	6
Conclusion	9
Appendix A: Opinions (majority and dissenting) of the Court of Appeals of Maryland	A-1
Appendix B: Opinion of the Court of Special Appeals of Maryland	A-48
Appendix C: Relevant Proceedings in the Circuit Court for Prince George's County, Maryland	A-56

TABLE OF AUTHORITIES

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	7
State v. Martin, 165 Wash. 180, 187, 4 P.2d 880, 882 (1931)	8
Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973)	7,8
Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	7
Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970)	7
Constitution of the United States, Amendment VI	3
Amendment XIV	3
Maryland Rule 741(d)(3)	3

OPINIONS BELOW

The Court of Appeals of Maryland filed a reported (official) opinion on February 10, 1983, which is attached as Appendix "A". The Court of Special Appeals of Maryland filed an unreported (unofficial) opinion on July 31, 1981, which is attached as Appendix "B". The relevant proceedings in the trial court, attached as Appendix "C", contain an oral opinion delivered by the trial judge.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the Court of Appeals of Maryland, rendered February 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

PERTINENT CONSTITUTIONAL PROVISIONS AND RULE

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ... .

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; ... .

Maryland Rule 741 (in pertinent part):

> d. Discovery by the State.
>
> Upon request of the State, the defendant shall: ...
>
> 3. Alibi Witnesses.
>
> Upon designation by the State of the time, place and date of the alleged occurrence, furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request.
>
> . . .
>
> g. Protective Orders.
>
> Upon motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. All material and information to which a party is entitled must be disclosed in time to permit beneficial use thereof.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner was charged by indictment with robbery with a deadly weapon and use of a handgun in the commission of a crime of violence. On May 21 and 22, 1980, he was tried by the Circuit Court for Prince George's County, Maryland. During the course of that trial, as set forth below, the federal due process issue giving rise to this Petition was specifically considered and ruled upon by the trial judge. Petitioner was convicted of both offenses, and on August 18, 1980, was sentenced to incarceration for a period of 12 years. On July 31, 1981, the judgment was affirmed by the Court of Special Appeals of Maryland in an unreported per curiam decision. On October 26, 1981, a Writ of Certiorari was issued by the Court of Appeals of Maryland. On February 10, 1983, that Court upheld Petitioner's convictions, with three judges joining in a dissenting opinion.

RELEVANT FACTS

Petitioner's trial commenced on May 21, 1980. That morning, defense counsel requested a continuance to obtain as a witness one "Karen Bellamy" (referred to later in the trial as "Caroline Bellamy"). Counsel proffered that Petitioner had provided Bellamy's name and telephone number earlier, but that she (counsel) had been unable to get in touch with her. The requested continuance was denied, and trial commenced that afternoon. There was no proffer made as to Bellamy's testimony, and the denial of this request for a continuance is not directly at issue on this appeal.

The State's principal witness was John Parker, who was on probation for storehouse breaking at the time of trial. Parker testified that during the evening of September 1, 1979, he was present in his residence at 6801 Walkermill Road in District Heights, Maryland. A man whom he identified at trial as Appellant

knocked on the door and engaged him in conversation. Approximately five minutes later, a second man, armed with a handgun, entered the residence. The two men proceeded to bind Parker's hands, "ransack" the house, and steal various items including jewelry and antiques valued at between $5,000 and $10,000.

In the aftermath of the offense, Parker was twice shown photographic arrays by an investigating officer. The first array, displayed on the night of the robbery, did not contain a photograph of Petitioner. Parker selected the photograph of an alleged "look-alike" named William Godwin Carter. On November 1, 1979, Parker was shown a second array and selected a photograph of Petitioner.

At the commencement of the afternoon session of Thursday, May 22, after the prosecution had rested its case, the defense sought to call as an alibi witness Edward Rich. Counsel proffered that for approximately three months following August 22, 1979, Rich was confined to his home, under the care of two named physicians, recovering from certain injuries. During the three or four weeks beginning August 22, specifically including the night of the robbery, Petitioner visited Rich each evening, played chess with him, and generally cared for him.

The prosecutor objected to permitting Rich to testify on the conceded ground that the defense had failed to comply with Maryland's "notice of alibi" rule (Maryland Rule 741(d)(3)), which requires that the defense disclose the names and addresses of alibi witnesses prior to trial. During the lengthy ensuing bench conference, the court and counsel discussed whether the appropriate resolution would be a continuance to permit the prosecutor to investigate the alibi and Rich's background so as to permit effective cross-examination, or alternatively to refuse to permit Rich to testify.[1] In answer to the specific question of how long he would need to prepare, the prosecutor responded "Monday. That

[1] The entire colloquy, Petitioner's testimony with regard to the reasons for his failure to timely disclose Rich's identity, and the trial court's ruling are reproduced in Appendix "C".

would give me adequate time." While he continued his objection and detailed the steps he would have to take to adequately prepare, the prosecutor reiterated that he would be willing "to go along with" a continuance.

During the course of the conference, the trial judge stated that "I will admit that a strict enforcement of the rule may interfere with due process, and that is what is bothering me." Shortly thereafter, he changed his mind and ruled that Rich would not be permitted to testify. In arriving at this ruling, the court noted that the following Monday was Memorial Day, and that a continuance might disturb the vacation plans of jurors whose service was due to end at the conclusion of Petitioner's trial. As the dissenters in the Court of Appeals pointed out, the court never questioned any of the jurors to determine whether or not this was the case.

After the court rendered its decision and other matters were briefly discussed, it was determined that Petitioner would testify out of the jury's presence regarding his efforts to secure the attendance of witnesses at his trial. Petitioner testified that he had contacted Rich the previous December, and that Rich had agreed to testify in his behalf. Rich then became ill and changed his residence, and Petitioner was unable to get in touch with him. The day before trial, Petitioner was finally able to get in touch with him through Rich's mother. The trial judge ruled that Petitioner had not demonstrated sufficient diligence, and reaffirmed his earlier decision that the witness would not be permitted to testify. The defense then rested without calling any witnesses, and Petitioner was convicted.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner asserts that his case presents an important question of federal constitutional law which has given rise to substantial litigation with conflicting results throughout the United States. It is reasonable to anticipate that such litigation

will continue, as this Court has twice noted that the question is still an open one. As a result of the application of the law as construed by the Maryland courts, Petitioner is serving a substantial prison term following a trial at which the State was permitted to put on a case, but he was not. Finally, the issue has been perceived from the outset as a possible infringement upon Petitioner's federal constitutional rights. For these reasons, certiorari is appropriate under Rule 17(b) and (c) of this Court.

It is now axiomatic that the right of a criminal defendand to call witnesses in his behalf is a basic component of due process of law. In Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), this Court wrote that

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), where the Court wrote that "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

The justification for the infringement upon Petitioner's right to call witnesses in the instant case was his non-compliance with Maryland's "notice of alibi" rule. This Court has had occasion to discuss in detail the characteristics and functions of such rules. See Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970). In both cases, the Court expressly declined to determine the constitutional ramifications of precluding relevant evidence as a result of non-compliance with the rule. In Williams, 399 U.S. at 83 n. 14, Justice White for the Court wrote:

> We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice of alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. ... It is enough that no such penalty was exacted here.

To the same effect, see Wardius, 412 U.S. at 472 n. 4.

A definitive resolution of the issue by this Court would plainly be in the public interest because of the proliferation of cases in lower courts which have produced conflicts both in results and reasoning. The cases are collected and analyzed in the majority and dissenting opinions of the Maryland Court of Appeals, and no purpose would be served in repeating that analysis here. Suffice it to say that reported appellate decisions represent only the tip of the iceberg, and provide strong evidence that the issue recurs on a regular basis at all levels of the criminal litigation process. Definitive guidance from this Court is necessary to supplant the numerous lists of criteria now applied by judges throughout the nation faced with the problem of how to resolve a conflict between a defendant's constitutionally-protected right to call witnesses and the prosecutor's legitimate expectation that the discovery rules will be complied with.

It is submitted that Petitioner's case presents an ideal record for resolution of this issue. It is conceded that Petitioner failed to comply with a rule that is typical of notice-of-alibi rules throughout the nation. As a result, he was denied the opportunity to adduce evidence through his only witness, and was convicted after having rested without offering any defense at all. It is also clear from the record that a continuance of a few days would have cured any resulting prejudice to the State. The issue is where to strike the balance. The basis of Petitioner's position on the merits is that the right to put on a defense is so essential to a determination that a criminal trial comported with due process

that considerations of expense and inconvenience must be subordinated, even under some circumstances where that expense and inconvenience was caused by the failure of the defense to comply with a rule of procedure. As the Supreme Court of Washington wrote in State v. Martin, 165 Wash. 180, 187, 4 P.2d 880, 882 (1931),

> The constitutional mandate, which directs the court to compel the attendance of witnesses on behalf of a defendant charged with a crime, is so strong that slight delays in the otherwise orderly presentation of evidence must be tolerated within the judicial system unless they are occasioned by insufferable dereliction of duty by those whose function it is to assist the court.

Petitioner was denied a fair trial, and his case presents an excellent record for this Court to resolve an open question which has given rise to substantial litigation with conflicting results and analysis. In the interests of fairness, uniformity, and judicial economy, the Writ accordingly should issue.

CONCLUSION

By reason of the foregoing, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Appeals of Maryland.

Respectfully submitted,

Michael R. Malloy

Michael R. Malloy
Assistant Public Defender
for the State of Maryland

Counsel for Petitioner

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

NOTICE OF APPEARANCE

MR. CLERK:

Please enter my appearance as counsel for Petitioner in the above-entitled case.

Michael R. Malloy

Michael R. Malloy
Assistant Public Defender
Tower Building
222 E. Baltimore Street
Baltimore, Maryland 21202
(301) 659-4900

Counsel for Petitioner

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Vernon Thaddeus Taliaferro, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland at the time of his trial and at appellate proceedings thereafter, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this Petition is attached hereto.

Michael R. Malloy

Michael R. Malloy
Assistant Public Defender
Tower Building
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Baltimore, Maryland 21202
(301) 659-4900

Counsel for Petitioner

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Vernon Thaddeus Taliaferro, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1979 $10,500

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Vernon Thaddeus Taliaferro
Vernon Thaddeus Taliaferro

Subscribed and sworn to before me, a Notary Public, this 24th day of March, 1983.

CHARLES R. SIMONSEN NOTARY PUBLIC BALTIMORE CITY, MD.

Charles R. Simonsen
Notary Public

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

APPENDICES

APPENDIX A

Opinion of the Court of Appeals of Maryland.....A-1

APPENDIX B

Opinion of the Court of Special Appeals of Maryland.....A-48

APPENDIX C

Relevant Proceedings of May 22, 1980, in the
Circuit Court for Prince George's County, Maryland.....A-56

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

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v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 30th day of March, 1983, copies of the foregoing Petition for Writ of Certiorari were delivered to Deborah K. Handel, Esquire, Assistant Attorney General of Maryland, The Munsey Building - 4th Floor, 7 North Calvert Street, Baltimore, Maryland 21202, Attorney for the Respondent, the State of Maryland.

Michael R. Malloy

Michael R. Malloy
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Counsel for Petitioner

IN THE COURT OF APPEALS OF MARYLAND

No. 101

September Term, 1981

VERNON THADDEUS TALIAFERRO

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Menchine, W. Albert
(retired, specially assigned)

JJ.

Opinion by Rodowsky, J.
Eldridge, Cole and
Davidson, JJ., dissent.

Filed: February 10, 1983

4-1

Petitioner, Vernon Thaddeus Taliaferro (Taliaferro), was convicted on May 22, 1980, in a jury trial before the Circuit Court for Prince George's County, of robbery with a deadly weapon and use of a handgun in the commission of a felony. On the last trial day petitioner sought to introduce the testimony of an alibi witness whose identity was disclosed to the State for the first time on that date. Acting under Md. Rule 741,[1] the

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[1]The rule, dealing with criminal causes, in relevant part provides:

Rule 741. Discovery and Inspection.

....

d. *Discovery by the State.*

Upon the request of the State, the defendant shall:

....

3. Alibi Witnesses.

Upon designation by the State of the time, place and date of the alleged occurrence, furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request.

....

f. Continuing Duty to Disclose.

If, subsequent to compliance with a request made under this Rule or with any order compelling discovery, a party discovers additional matter previously requested and required to be furnished, he shall promptly furnish the matter to the other party or his counsel. If the additional matter is discovered during trial, in addition to furnishing the matter promptly to the other party or his counsel, he shall notify the court that the matter is being furnished to the other party.

trial court excluded the proffered alibi evidence. There was no other proof from the defense. The conviction was affirmed by the Court of Special Appeals in an unreported opinion. We granted certiorari to consider whether "the trial court's ruling that Petitioner's sole witness would not be permitted to testify constitute[d] an abuse of discretion and/or a denial of due process." We shall hold that, on the facts of this case, there was no abuse of discretion or denial of due process.

The victim was John Leo Parker (Parker), an adult, who resided at his mother's home at 6801 Walkermill Road, in District Heights. On September 1, 1979, at approximately 9:05 P.M., Parker was at home, alone. He answered a knock at the door. It was a man, who was unknown to Parker, inquiring about someone named "Billy". The light inside the house was on, as well as were two lights outside on the porch. Parker and the man conversed face to face, at a distance of two feet, for an estimated five minutes. Then a second man came up behind the first and pointed a cocked

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1 (Cont.)

g. *Protective Orders.*

Upon motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. All material and information to which a party is entitled must be disclosed in time to permit beneficial use thereof.

handgun at Parker over the shoulder of the first man. Parker was spun around and led through the house to his mother's room which the men ransacked. Jewelry, later valued at a minimum of $5,000, was taken. Parker was left tied up. That evening the police showed Parker a photographic array which did not include Taliaferro's picture. Parker selected one photograph as a "look-alike." On November 1, 1979, the police showed Parker another photographic array. It contained a picture of Taliaferro whom Parker identified as the robber with whom he had conversed. At trial, Parker also made an identification of Taliaferro in person.

Petitioner was arrested on November 28, 1979 and released on cash bail the next day. He remained on bail continuously until his sentencing. An indictment of Taliaferro and a second man[2] was returned December 19, 1979. Counsel entered her appearance for Taliaferro on January 8, 1980. On February 1, 1980 the State filed a motion for discovery requesting, *inter alia*, the "name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at" 6801 Walkermill Road, District Heights, Maryland on September 1, 1979, at approximately 21:05 hours.[3] Under Md. Rule 741 e 1 disclosure of any alibi witnesses was due to be furnished by February 11. No written response was ever made.

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[2]An Elijah Howard Pringle was jointly indicted with Taliaferro, but was tried separately.

[3]No point was made in the trial court, or on appeal, based on lack of timeliness of the State's motion.

On February 14, 1980 a notice was sent to petitioner's counsel, with a copy to Taliaferro at his address in Baltimore City, setting trial for April 11, 1980 and setting a pretrial conference for March 27, 1980. By a notice dated March 3, 1980, with copy to petitioner personally, trial was reset from April 11 to May 21, 1980. A March 28, 1980 notice, with copy to petitioner personally, reset the pretrial conference from March 27 to May 6, 1980.

Taliaferro was present with his attorney at the pretrial conference. The court was advised that there would be one defense witness.[4] Counsel for both parties signed a pretrial memorandum at that conference which reads in part:

> Counsel further certify that ... the names of all witnesses now known have been exchanged by the parties and that this case is ready for trial.
>
> Counsel certify that all witnesses are available for the trial date ....

On the morning trial was scheduled to begin, May 21, Taliaferro's counsel requested a continuance. She advised the court that Taliaferro had given her the name and telephone number of a "Karen Bellamy" at the first interview, that counsel had never been able to reach the witness by telephone, but that

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[4] Statements made to the court at trial by petitioner and his counsel indicate that the anticipated defense witness may have been identified at that time as Caroline Bellamy (also referred to as Karen Bellamy). There is no contention, however, that the State knew earlier than at trial that the defense was alibi.

Taliaferro had that day given counsel the witness' address. The requested continuance was denied. Trial of Taliaferro's case began at 2:55 P.M. on May 21, with the selection of the jury. A motion to suppress the photographic identification was heard and denied. Trial on the merits proceeded with the testimony of Parker and of the investigating police officer. On cross-examination, Parker admitted that, at the time of the crime, he was on probation for storehouse breaking. Court adjourned at 5:20 P.M.

Trial resumed at 9:30 A.M. on Thursday, May 22 with brief testimony from Parker's mother as to the value of the property taken. The State rested. Petitioner's counsel advised the court that Taliaferro had "been in touch with the witness that I was telling you about" and that Taliaferro was "trying to get someone here" from Baltimore. A delay of 1-1/2 hours was requested so that Taliaferro could "try to get him here."[5] At 10:10 A.M. the court recessed until 11:30 A.M. after denying the defense motion for a judgment of acquittal. The jury was brought back into the courtroom at 12:05 P.M. and excused for lunch with instructions to report back at 1:30 P.M.

Colloquy and testimony in the afternoon of May 22 reveal that Taliaferro had spoken by telephone that morning with an Edward Rich, Jr. (Rich) in Baltimore. Taliaferro is also a

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[5]The transition to the personal pronoun, "him," on the morning of the 22nd is the first indication in the record that the prospective witness was not Caroline Bellamy.

resident of Baltimore. Taliaferro's father had gone to Baltimore and brought Rich to the court house in Upper Marlboro. At 1:25 P.M., in the court house corridor, Rich had been introduced to the prosecutor as an alibi witness. Court reconvened at 1:30 P.M. with the jury in the box. The prosecutor, at sidebar, objected to Rich testifying because "a couple of minutes before court I started to talk to the gentleman -- I do not believe that gives me fair opportunity to pursue this gentleman's background to investigate the evidence that he proposes to give, and if necessary, to get any rebuttal witnesses to his testimony." The court was asked to preclude the witness from testifying.

Defense counsel stated that she had not known what Rich was to testify to until Rich came to the court house. She had asked Taliaferro previously for witnesses and he had given the name of the friend, Caroline Bellamy, whom counsel had been unable to get to court because of lack of an address.

The court, after stating that the only alternative to excluding the testimony was a continuance, asked the prosecutor what he would have done had Rich's name been disclosed as an alibi witness the preceding week. This colloquy ensued:

> [PROSECUTOR]: For one thing, I would have had the police department run a record check on [Rich], try to determine where he lives, what connection he has had with this defendant, or the co-defendant in the past, all sorts of things I can't do on the spur of the moment. I may not come up with anything.
>
> THE COURT: How long do you need to do that?

[PROSECUTOR]: Monday. That would give me adequate time.

THE COURT: We may have to do that.

[PROSECUTOR]: Let me just check my schedule. Monday is Memorial Day.[6]

THE COURT: I wonder how many of these jurors are due back to work [as jurors] next week. We are going to lose some of them if they have a holiday Monday and they are not due back. I might inquire how many of them would have more time to serve, and then make a decision.

Ladies and gentlemen of the jury, how many of you are winding up your jury service this week?

That ends that. Six people put their hands up.[7]

[DEFENSE COUNSEL]: Is your investigation going to concern itself just with checking with the police?

[PROSECUTOR]: I am not sure exactly, depending on what we may determine, it may require me to consider rebuttal witnesses. I am just not certain, but I had no reason to believe there were going to be any alibi witnesses in this case, and I would just like to sit down and think about it.

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[6]Monday, May 26, 1980 was the last Monday in May and was the day celebrated as Memorial Day by the federal government. *See* 5 U.S.C. § 6103(a) (1976). The State of Maryland celebrates Memorial Day on May 30 which was the Friday of the following week in 1980. *See* Md. Code (1957, 1981 Repl. Vol.), Art. 1, § 27(a)(7). Maryland courts observe the holiday designated by State law. Md. Rule 1205 a.

[7]Prince George's County, Maryland adjoins the District of Columbia. Many of the county's residents are employed by the federal government. It appears that the trial judge was attempting to determine how many jurors were told their term of service would expire on Friday, May 23, and might have made plans for the three day federal holiday weekend.

The defense proffered that Rich would testify that he had injured his back and head on August 22, 1979, had been confined to his house for approximately three months, and that during at least the first three or four weeks of the confinement, Taliaferro had been at his house each evening, including September 1, the evening of the crime. Defense counsel suggested "a couple of simple telephone calls would provide the investigation" sought by the State, and that it could be done that day. The State replied that "there is a little more involved than a mere record check." He said there might be other factors which he would like to check out in addition to Rich's record and his disability. In the course of his argument the State's Attorney stated that "[i]f the court wants to continue [the case], it is fine with me ..." and also that he was "willing to go along with" putting the case off for a few more days.

Following a recess, the trial judge, after outlining most of the procedural history of the case, ruled that he was exercising his discretion to refuse to permit the alibi testimony, for failure to comply with Rule 741 d 3.

Taliaferro elected not to testify. After a conference with counsel in Chambers the court resumed the bench and advised defense counsel that it would give her

> the opportunity if you like, to put in the record the efforts that the defendant has made over a period of whatever time to locate and produce this alibi witness because I don't know that there is anything in here to indicate what, if anything, he has done, and depending on that, it is a matter of diligence as far as I am concerned, and if diligence has been rewarded, as of today, that may be one

> thing. If there is no diligence, that may be another thing. If there has been some diligence but not much, that would be another thing.

Taliaferro was sworn and testified. In substance he said that he had contacted Rich around December 1979. Rich was willing to come to court. At that time Rich was living at his mother's house, but had subsequently left, and Taliaferro did not know where Rich was living. Taliaferro had gotten in touch with Rich "yesterday, the day before yesterday" by telephoning Rich's mother's house and Rich was there. Rich's mother had lived at the same address and had had the same telephone number since September of 1979. Taliaferro could not say when he had last called Rich's mother's home prior to May 21, 1980. When Taliaferro had called Rich's mother's home on prior occasions, he would leave a message for Rich but had never received any return calls.

Defense counsel then presented an argument based on the factors set forth in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), *cert. denied*, 439 U.S. 847, 99 S. Ct. 147, 58 L. Ed. 2d 149 (1978) as ones to be considered in deciding whether to exclude. In that case, dealing with a prosecution rebuttal witness, the court listed the amount of prejudice resulting from the failure to disclose, the reason for non-disclosure, the extent to which the harm caused by non-disclosure has been mitigated by subsequent events, the weight of the properly admitted evidence supporting the defendant's guilt, and other relevant factors arising out of the circumstances of the particular case. As to the reason for Taliaferro's non-disclosure, defense counsel argued that

> Mr. Taliaferro has testified the reason he talked to [Rich] in December about it, and then [Taliaferro] was of the opinion that Caroline Bellamy was going to testify, he didn't have an address for Caroline Bellamy. After he spoke with Mr. Rich, Mr. Rich then moved, and he made efforts to find out where it was he lived. He didn't know until today where Mr. Rich lived. We couldn't have provided that if we had to.

In deciding to let its ruling stand, the court explained in part as follows:

> It appears to me, that if I could have found that the defendant was diligent in his efforts *in providing this name and address*, and that his diligence just paid off yesterday, that I could then rule that he has done all that the rule requires. However I can't make that finding. From what I have heard from the way this defendant has testified, he has known the address of the mother of the witness. The mother of the witness still resides at the same address she resided at back in November. It is also obviously very important to this defendant to have this alibi witness here, probably one of the most important decisions of his life .... He waits until two days before the trial to actually locate this witness, when he could have done so early on. He hasn't made any real effort, except yesterday to locate this witness, and then springs it so to speak on the state the second day of trial .... [Emphasis supplied.]

The reasons underlying a procedure that requires notice of an alibi defense are well stated in Epstein, *Advance Notice of Alibi*, 55 J. Crim. L., Criminology & Police Sci. 29, 31-32 (1964):

> *One.*--Foremost is the idea that the statute prevents surprise. Alibi has been termed a "hip pocket" defense because of the ease with which it can be manufactured for introduction in the final hours of trial.
>
> *Two.*--The statute acts to deter false alibis because defendants know that the information furnished will be investigated before trial ....
>
> ....

> *Three.*--Pretrial investigation results in a saving of money and trial time. This occurs in two ways. (1) If, after the investigation, the district attorney is satisfied that the alibi is true, the case should be dismissed; (2) the district attorney is not surprised at trial by the alibi defense, and there is no need for a continuance to investigate and prepare ....
>
> ....
>
> *Four.*--Alibis which are presented at trial will be accorded more respect .... [Footnotes omitted.[8]]

In *Williams v. Florida*, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446, 450 (1970), the Court rejected a due process challenge to Florida's notice of alibi rule:

> We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of "due process" or a "fair trial." Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. [Footnotes omitted.]

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[8] Epstein advances as a fifth reason that the rule "is important in the context of more liberal discovery in criminal cases."

The Federal Rules of Criminal Procedure have since 1975 included a notice of alibi requirement in Rule 12.1. Upon failure of either party to comply with the requirements of that rule, "the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense." Fed. R. Crim. P. 12.1(d). United States Courts of Appeals view the imposition of the sanction of exclusion as involving an exercise of discretion and the standard for appellate review is whether there has been an abuse of discretion.[9]

A requirement for notice of an alibi defense, with identification of proposed alibi and rebuttal to alibi witnesses, now exists under statute or rule of court in 35 of our sister states and in the District of Columbia. There is an express provision for exclusion of alibi witness testimony as a sanction for violation in all but three of these jurisdictions.[10] Twenty-three jurisdictions provide that for violation of the alibi disclosure requirements the court "may" exclude the testimony.[11]

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[9]United States v. Woodard, 671 F.2d 1097, 1100 (8th Cir. 1982); United States v. White, 583 F.2d 899, 902 (6th Cir. 1978); United States v. Fitts, 576 F.2d 837, 839 (10th Cir. 1978); United States v. Barron, 575 F.2d 752, 757 (9th Cir. 1978); United States v. Myers, supra, 550 F.2d 1036, 1043; United States v. Smith, 524 F.2d 1288, 1290 (D.C. Cir. 1975).

[10]Me. R. Crim. P., Rule 16A(b) ("the court may take appropriate action."); Minn. R. Crim. P. 9.02, 9.03 ("the court may upon motion and notice ... enter such order as it deems just in the circumstances."); Wash. Super. Ct. Crim. R. 4.7 ("the court may ... enter such other order as it deems just under the circumstances.").

[11]Ariz. R. Crim. P. 15.2, 15.7; Ark. R. Crim. P. 18.1, 19.7 ("the court may ... prohibit the party from introducing in evidence

In eight states, the sanction provision states that the court shall exclude the alibi or alibi rebuttal testimony, unless the party offering it shows good cause to the contrary.[12] In Michigan, the statute in terms mandates the exclusion of evidence offered in violation of the disclosure requirements, without any express good cause exception.[13] In Kansas, the statute permits adding to a list of alibi witnesses initially properly filed, but otherwise appears to mandate exclusion for failure to give notice.[14]

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11 (Cont.)

Crim. P. 3.200; Haw. R. Penal P. 12.1; Idaho Code § 19-519 (1979); Ill. Sup. Ct. R. 413(d), 415 (g); La. Code Crim. Proc. Ann. art. 727 (West 1981); Mass. R. Crim. P. 14(b); Miss. Unif. Cir. Ct. Crim. R. 4.07; Mo. Sup. Ct. R. 25.05, 25.16; Nev. Rev. Stat. § 174.087 (1981); N.H. Super. Ct. R. 100; N.J.R. Crim. Prac. 3:11; N.M.R. Crim. P. 32; N.Y. Crim. Proc. Law § 250.20 (McKinney 1971, 1981 Cum. Supp.); N.D.R. Crim. P. 12.1; Ohio Rev. Code Ann. § 2945.58 (Page 1982); Pa. R. Crim. P. 305 C; R.I.R. Crim. P. 16(c); Tenn. R. Crim. P. 12.1; Utah Code Ann. § 77-14-2 (1982); W. Va. R. Crim. P. 12.1.

[12]Colo. Rev. Stat. § 16-7-102 (1978); Ind. Code Ann. § 35-36-4-1 *et seq.* (Burns 1979, 1982 Cum. Supp.); Iowa Code Ann. § 813.2, Rule 10(10) (West 1979, 1982 Cum. Supp.); Mont. Code Ann. § 46-15-301 (1981); Or. Rev. Stat. § 135.455 (1981); S.D. Comp. Laws Ann. § 23A-9-1 *et seq.* (1979); Vt. R. Crim. P. 12.1; Wis. Stat. Ann. § 971.23(8) (West 1971, 1982 Cum. Supp.).

[13]Mich. Comp. Laws Ann. §§ 768.20, 768.21 (West 1982). People v. Merritt, 396 Mich. 67, 82, 238 N.W.2d 31, 37-38 (1976) which Taliaferro emphasizes and which held that preclusion should be limited only to an "egregious" case, was decided under a prior statute.

[14]Kan. Stat. Ann. § 22-3218 (1981).

In most states, as in the federal system, the sanction to be applied rests in the discretion of the trial court where there has been a violation of a rule requiring the timely disclosure of alibi or rebuttal witnesses in a criminal case. Application of the sanction is reviewable on appeal to determine if discretion has been abused. The exclusion of testimony from defense alibi witnesses has been sustained in many cases. Among the more recent decisions reaching that result are: *Clark v. United States*, 396 A.2d 997 (D.C. 1979); *Davis v. State*, 411 So. 2d 880 (Fla. App. 1981); *State v. Davis*, 63 Haw. 191, 624 P.2d 376 (1981); *James v. State*, 411 N.E.2d 618 (Ind. 1980); *People v. Robinson*, 104 Ill. App. 3d 20, 432 N.E.2d 340 (1982); *People v. Bratton*, 81 Ill. App. 3d 808, 401 N.E.2d 1062 (1980); *State v. Christensen*, 323 N.W.2d 219 (Iowa 1982); *State v. Broum*, 414 So. 2d 689, 698-99 (La. 1982); *Commonwealth v. La Frennie*, 13 Mass. App. 977, 432 N.E.2d 535 (1982); *State v. Lindsey*, 284 N.W.2d 368, 373-74 (Minn. 1979); *Eckert v. State*, 96 Nev. 96, 605 P.2d 617 (1980); *State v. Fisher*, 301 N.W.2d 367 (N.D. 1980); *State v. Mai*, 54 Or. App. 334, 634 P.2d 1367 (1981) (in banc), *petition for review allowed*, 292 Or. 334, 644 P.2d 1125 (1981).

In the context of a notice of alibi rule, the Supreme Court has not yet passed upon the constitutionality of exclusion as the sanction for violation by an accused. *See Wardius v. Oregon*, 412 U.S. 470, 472 n.4, 93 S. Ct. 2208, 2211 n.4, 37 L. Ed. 2d 82, 86 n.4 (1973) and *Williams v. Florida*, *supra*, 399 U.S. at 83 n.14, 90 S. Ct. at 1897 n.14, 26 L. Ed. 2d at 491 n.14. However, state courts and lower federal courts have decided that the

exclusion of alibi testimony offered by an accused who has violated an alibi discovery requirement does not offend the Sixth Amendment right to have compulsory process for the obtaining of witnesses. "The reasoning is that the alibi rule does not prevent a defendant from compelling the attendance of witnesses; rather, the rule provides reasonable conditions for the presentation of alibi evidence." *State v. Smith*, 88 N.M. 541, 543, 543 P.2d 834, 836 (N.M. Ct. App. 1975).[15] *See also Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *United States ex rel. Snyder v. Mack*, 372 F. Supp. 1077 (E.D. Pa. 1974); *State v. Dodd*, 101 Ariz. 234, 237, 418 P.2d 571, 574 (1966); *State v. Roberts*, 226 Kan. 740, 602 P.2d 1355 (1979); *People v. Jackson*, 71 Mich. App. 395, 249 N.W.2d 132 (1976);[16] *State v. Flohr*, *supra*, 301 N.W.2d 367; *Commonwealth v. Vecchiolli*, 208 Pa. Super. 483, 224 A.2d 96 (1966); *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 163 N.W.2d 177 (1968

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[15] In *Smith* the defendant timely gave a general notice of intent to rely on alibi as a defense, but did not give the names and addresses of alibi witnesses or specify the place at which the defendant claimed to have been at the time of the alleged offense, as required by the applicable rule.

[16] *Jackson* sustained application of the Michigan mandatory exclusion sanction where the defendant gave notice seven days before trial, but it was three days late.

[17] There are cases arising under the federal habeas corpus statute in which exclusion of defense alibi witnesses has been held to constitute a denial of due process on the particular facts presented. Hackett v. Mulcahy, 493 F. Supp. 1329 (D.N.J. 1980) involved a notice of alibi defense given by prior counsel for the accused which was due on June 3. A general notice had been given June 18 and the identity of witnesses was furnished July 7. Trial did not commence until November 1. After the defendant's new counsel made an opening statement which indicated that the defense was alibi and that alibi witnesses would be called, the prosecutor told the court he was "not too concerned with alibi witnesses," and that he had not talked with them. The first defense witness

Subsection g of Md. Rule 741 permits the trial court to fashion an appropriate order when a party has failed to comply with that Rule. A court "may," *inter alia*, "grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed ... or enter any other order appropriate under the circumstances." The Maryland rule, while expressly recognizing exclusion as a possible sanction, does not mandate its imposition. Nor does it specify exclusion as the sanction for violation, in the absence of good cause for not imposing it. Rule 741 g leaves the sanction, if any, to the discretion of the trial court. The imposition of an exclusionary sanction against the State or the accused under Rule 741 is circumscribed only by the principle of abuse of discretion

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17 (Cont.)

was the prior attorney. He was cross-examined concerning the untimely notice. When the defense attempted to have the alibi witnesses testify, they were excluded and the jury was told the alibi defense would not be allowed because defense counsel had not complied with court rules. The United States District Court concluded:

> In view of the highly technical nature of his counsel's error, the absence of any evidence of complicity by petitioner in that error, the lack of any prejudice to the State caused by the error, the severe prejudice to petitioner caused by the preclusion sanction, and the use of that sanction by the prosecution before the jury, we find that this defendant was deprived of fundamental rights and of due process of law. [*Id.* at 1340.]

Brown v. Wainwright, 459 F. Supp. 144 (M.D. Fla. 1978) found a due process violation in a Florida prosecution. That state has broad discovery in criminal cases. Both the state and the defense had failed to comply with the rules, but only the defense witnesses were precluded from testifying while the state was permitted to introduce previously undisclosed documents which should have been

and by constitutional limitations, under all of the relevant circumstances.

The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file. *See Bradford v. State*, 278 So. 2d 624 (Fla. 1973) (trial court erred by excluding defense witnesses based solely on the absence of their names from witness list furnished state) and *State v. Sias*, 393 So. 2d 677 (La. 1981) (trial court erred by treating statute that made exclusion discretionary as if exclusion were mandatory). In the instant case, the trial court recognized that it had, and was applying, discretion. It heard extensive arguments from both counsel and a proffer of proof before initially ruling to exclude, then took evidence from the accused, and again heard argument from defense counsel before deciding not to disturb its initial ruling.

Under the approach taken by most courts, whether the exclusion of alibi witness testimony is an abuse of discretion turns on the facts of the particular case. Principal among the relevant factors which recur in the opinions are whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

In the case at hand the rule violation was a gross one. There was no attempt at compliance. This is not a case where notice was given a few days late, but well in advance of trial, or given in a technically defective form. Illustrative of what was held to be a technical non-compliance is *State v. Silva*, 118 R.I. 408, 374 A.2d 106 (1977). Six months prior to trial, but 10 days late under the court rule, the defendant filed a notice of alibi defense, stating that he spent the entire evening in question at two specified addresses and identifying three alibi witnesses. Five weeks prior to trial the disclosure was supplemented by an additional witness' name, without an address. The trial court excluded the alibi testimony for lack of compliance with the rule's specificity requirements. It was held there was substantial compliance with the letter and spirit of the rule and that "the trial court abused its discretion in excluding the defendant's alibi testimony." *Id.* at 412, 374 A.2d at 109.

Nor did Taliaferro present any excuse justifying the violation. His counsel had asked about Taliaferro's witnesses at the first interview and had been given the name and telephone number of Caroline Bellamy. While the record does not explicitly show whether Ms. Bellamy was to be an alibi witness or not, she was not presented as a witness and there is no contention of error in the denial of a postponement to obtain her presence in court. It was Rich who was excluded. Under Taliaferro's proffer, he was with Rich, at Rich's mother's home in Baltimore, every night for a period of weeks surrounding and including the night

of the robbery. Taliaferro knew Rich's name and at least his last known address at his mother's home. Indeed, in the preceding December Taliaferro and Rich had discussed Rich being a witness. But Taliaferro did not give Rich's name to defense counsel as an alibi witness until the second day of trial. The only justification which Taliaferro attempted to present was that he had not been able to locate Rich. That explanation did not persuade the trial court to ignore the violation. It could not find that Taliaferro "was diligent in his efforts in providing this name and address ...."

In this respect, the instant matter duplicates *United States v. White*, *supra*, 583 F.2d 899. There the accused was aware of the identity of his alibi witness, Walker, for months prior to trial but did not reveal Walker until the close of all of the evidence. The reason given was that the accused had been unable to locate Walker. The Sixth Circuit affirmed barring the alibi witness, and said that

> the mere fact that appellant did not know Walker's whereabouts does not excuse appellant from complying with the identity requirements of Rule 12.1(a). If appellant had tendered notice of Walker's identity, the Government would have had an opportunity to locate Walker for the benefit of both parties. [583 F.2d at 902.]

Similarly, where the defendant was charged with committing a crime on August 17 and contended that each night during the period August 13 to August 21 he had spent his time in taverns and then later "'at the premises occupied by Alice Peasecke,'" but did not give notice of alibi until 5:00 o'clock on the afternoon of the

day preceding trial, the alibi evidence was excluded. It was held there was no good cause shown for the failure to disclose because the "defendant was aware of this alibi at all times and could have served his notice of alibi in compliance with the statute." *Jensen v. State*, 36 Wis. 2d 598, 153 N.W.2d 566, 568, *modified*, 36 Wis. 2d 598, 154 N.W.2d 769 (1967). In *United States v. Barron*, *supra*, 575 F.2d 752, the defendant did not disclose his alibi defense and alibi witnesses to his public defender counsel until after the jury had been empanelled. Counsel immediately advised the government. Based on the accused's steadfast refusal to cooperate in his own defense, coupled with the strength of the government's case, it was held that there had been no abuse of discretion in excluding the alibi witnesses, even though, as a result of the timing of the government's discovery request, the defendant's answer was only one day late. Alibi witnesses who were known to the defendant were also involved in *United States v. Smith*, *supra*, 524 F.2d 1238. At a pretrial conference defense counsel told the court that the defendant proposed to present an alibi defense, but counsel was unable to furnish the names of witnesses because the defendant had failed to provide counsel with their names. The trial court ruled the witnesses would not be allowed to testify. At trial, the defendant presented members of his wife's family as alibi witnesses, but the court adhered to its previous ruling. The District of Columbia Circuit found no abuse of discretion because no explanation had been given for the defendant's delay in furnishing the names of the witnesses. *People v. Braxton*, *supra*, 81 Ill. App. 3d 808, 401 N.E.2d 1062, involved an

attempt on the first day of trial to amend discovery answers to present an alibi defense, which was denied. An alibi witness, defendant's wife of two days, was precluded from testifying. In affirming, the appellate court said:

> [N]o evidence was produced showing that the defendant was unaware of his alibi defense and the existence of the alibi witness prior to [the day of trial]. Therefore, the trial judge did not abuse his discretion in denying the motion to amend the answer to discovery. [81 Ill. App. 3d at 815, 401 N.E.2d at 1067.]

Cases like the foregoing may be contrasted with *Williams v. State*, 97 Nev. 1, 620 P.2d 1263 (1981). There the accused had furnished counsel with the names of four alibi witnesses, and counsel had timely dictated the notice, but through inadvertence, had failed to file it until seven days prior to the scheduled trial date. The applicable rule required filing ten days prior to trial. However, because of a postponement, trial did not actually begin until ten days after the filing of the notice. Further, the State's case rested exclusively on the testimony of the victim. Under these circumstances it was held that good cause had been shown for relief from strict compliance with the statute.

With respect to the factor of prejudice, it is clear that Rich was the only non-party witness whom Taliaferro had present in court to testify. Further, as the trial judge recognized, Rich's testimony was important to the defendant. The prosecution's case rested on an identification only by the victim. However, had the trial court permitted Rich to testify on the afternoon when he was produced in court, the State would have been severely prejudiced. It would have had no opportunity to investigate Rich's background or to investigate the alibi,

disclosed at the last minute, which undertook to place Taliaferro with Rich at Rich's mother's home. Taliaferro does not contend that this should have been done. His point is that the court abused its discretion by failing to grant a continuance to enable the State to investigate, particularly since Taliaferro contends that the State conceded that a 1-1/2 day postponement would cure any prejudice. This argument ties reducing prejudice to a continuance and essentially raises the same considerations as an argument that the denial of a continuance to obtain a witness is an abuse of discretion. In that context we have said that the defendant must show, *inter alia*, "'that he [has] made diligent and proper efforts to secure the evidence.'" *Jackson v. State*, 288 Md. 191, 194, 416 A.2d 278, 281 (1980), quoting an earlier *Jackson v. State*, 214 Md. 454, 459, 135 A.2d 638, 640 (1957), *cert. denied*, 356 U.S. 940, 78 S. Ct. 784, 2 L. Ed. 2d 816 (1958). Here, the trial court, based on Taliaferro's own testimony, found a lack of diligence both in providing the name and address of Rich, and with respect to Taliaferro's explanation, in determining Rich's whereabouts.

Taliaferro's argument of a concession that a 1-1/2 day continuance would cure any prejudice to the State overstates the prosecutor's position as reflected by the record. The prosecutor's statement that a delay from Thursday afternoon until Monday morning would give him "adequate time" was a reference to the time within which Rich's background and connection with the defendant could be checked. The State's Attorney also asserted that he might wish to bring in rebuttal witnesses. Obviously the

prosecutor was not in a position, when Rich was sprung on him at the eleventh hour, to advise the court where an as yet unperformed investigation would lead. While a continuance would relieve the State of the severe prejudice of being required to cross-examine a surprise alibi witness immediately, the short continuance for which petitioner contends could never equate with the opportunity to prepare in the period from February 11 to May 21 to meet a disclosed alibi defense witness. That is what the State was entitled to under Rule 741 in this case. We cannot know what an investigation of Rich and of the alibi would have revealed, and it is speculation to treat the continuance alternative as involving a fixed period of 1-1/2 to 2-1/2 trial days. If the State, after initial investigation, had requested a further continuance for the purpose of obtaining witnesses to rebut the alibi and to impeach Rich, the matter could have been further exacerbated. We also note that there was no express waiver by Taliaferro of any claim of right to notice from the State of alibi rebuttal witnesses.

Further complicating the problem was that this was a jury trial. The trial court was also entitled to consider that the estimated term of service for half of its jury ended on Friday, May 23, so that a minimum continuance would be until Tuesday, May 27, unless plans which those jurors likely had made for the three day federal holiday were to be ignored.

It has been said that the exclusion sanction should be one of last resort, to be "invoked only in those cases where other

less stringent sanctions are not applicable to effect the ends of justice." *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979). This approach, if applied to a case like the one at bar, seriously undermines one of the major purposes of an alibi reciprocal discovery rule--avoiding trial interruption and delay. The Advisory Committee on the Federal Rules of Criminal Procedure, in recommending Fed. R. Crim. P. 12.1 stated (62 F.R.D. 271, 294-95):

> Prohibiting from testifying a witness whose name was not disclosed is a common provision in state statutes .... It is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance.
>
> * * *
>
> Rule 12.1 will serve a useful purpose even though rule 16 now requires disclosure of the names and addresses of government and defense witnesses. There are cases in which the identity of defense witnesses may be known, but it may come as a surprise to the government that they intend to testify as to an alibi and there may be no advance notice of the details of the claimed alibi. The result often is an unnecessary interruption and delay in the trial to enable the government to conduct an appropriate investigation. The objective of rule 12.1 is to prevent this by providing a mechanism which will enable the parties to have specific information in advance of trial to prepare to meet the issue of alibi during the trial.

The point is well made by Epstein, *Advance Notice of Alibi*, *supra*, 55 J. Crim. L., Criminology & Police Sci. at 35-36:

> Excluding the evidence has proved effective .... In contrast, the threat of a continuance is not a sanction at all; the prosecution would be granted a continuance on the ground of surprise, even without the statutory direction. If all the defendant risks is a continuance, he will purposely not give notice because the continuance is valuable to him. When it is granted, it comes after the

> prosecution has presented its evidence and allows it to get cold. The effect of using continuance as a "sanction" is also *contra* the deep concern of the bench and bar with trial delay.

The majority of courts which have considered the question, and the better reasoned decisions, are generally in accord with Epstein's analysis. *See United States v. White*, *supra*, 583 F.2d at 902 ("Because Walker's testimony was not offered until both parties had rested at the close of a three day jury trial, a continuance [for investigation] would not have been satisfactory."); *United States v. Barron*, *supra*, 575 F.2d at 757 (If liberal discovery and the prevention of trial delays "are to be effectuated and if the rule is to have any teeth, trial courts must be able to impose sanctions, even the drastic one employed in this case."); *State v. Dodd*, *supra*, 101 Ariz. at 237, 418 P.2d at 574 (1966) ("Because of defendant's failure to attempt compliance with the notice rule, we find no abuse of discretion in the instant case. Any decision to the contrary would render the force of [the alibi disclosure statute] nugatory."); *Clark v. United States*, *supra*, 396 A.2d at 999 ("[I]t is generally assumed that such a sanction [i.e. exclusion] is essential if the notice-of-alibi rule is to have any practical significance."); *State v. Davis*, *supra*, 63 Haw. at 198, 624 P.2d at 381 (exclusion essential for rule to have practical significance); *State v. Christensen*, *supra*, 323 N.W.2d at 223 ("[A] delay in the proceeding would create a substantial time interval between the presentation of the State's evidence and the defendant's evidence of alibi. This not only disrupts the judicial process but may also affect the jurors and the outcome

of the trial."); *State v. Lindsey*, *supra*, 234 N.W.2d at 374 ("[W]e recognize that the trial court had no other meaningful sanctions at its disposal; it was too far into trial to consider a continuance ...."); *State v. Woodard*, 102 N.J. Super. 419, 426-27, 246 A.2d 130, 134 (1968), *cert. denied*, 395 U.S. 938, 89 S. Ct. 2004, 23 L. Ed. 2d 453 (1969) ("To have waived the provisions of the rule, at that point in the trial [during cross-examination of the state's last witness], would have been highly unfair and prejudicial to the State--and an adjournment to allow the State to investigate the witness ... would not have cured this eleventh hour application."); *State v. Fiehr*, *supra*, 301 N.W.2d at 372 ("Quite simply, a defendant with an absolute right to submit evidence withheld from discovery has little to lose by being uncooperative. Alternative sanctions [to exclusion] appear less effective and often entail delay and expense, curtailment of discovery, and even potential constitutional problems."); *State ex rel. Simos v. Burke*, *supra*, 41 Wis. 2d at 129, 163 N.W.2d at 182 (Pretrial notice of alibi "avoids mid-trial state motions for adjournment on the ground of surprise to permit investigation of alibi claims. The interests of the prosecution, defense and public are served by such facilitating of orderly, uninterrupted trials for the seeking of the truth and the protection of the rights of all concerned.").

Months before trial in the case *sub judice* Taliaferro knew Rich's identity, his mother's address, and the date of trial and had been asked by counsel about witnesses. Without any justifying excuse, Taliaferro did not disclose Rich as an alibi witness until

the close of the State's case in a jury trial. The trial court acted well within the bounds of its discretion in excluding Rich's testimony and in not continuing the case.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY THE PETITIONER.

IN THE COURT OF APPEALS OF MARYLAND

No. 101

September Term, 1981

VERNON THADDEUS TALIAFERRO

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Menchine, W. Albert
(retired, specially assigned)
JJ.

Dissenting Opinion by Eldridge, J.
in which Cole and Davidson, JJ.,
concur.

Filed: February 10, 1983

A-29

Eldridge, J., dissenting:

The Supreme Court of the United States has twice expressly reserved the question of "[w]hether and to what extent a State can enforce" a notice-of-alibi rule "by excluding relevant, probative evidence" offered by the defendant, recognizing that it "is a question raising Sixth Amendment issues." *Williams v. Florida*, 399 U.S. 78, 83 n. 14, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). *See Wardius v. Oregon*, 412 U.S. 470, 472 n. 4, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Under circumstances like those in this case, where the sanction of exclusion for violating a notice-of-alibi rule operates to prevent a criminal defendant from calling his only alibi witness and thus from presenting his only defense to the charges, where the violation was not deliberate, and where any prejudice to the prosecution could have been cured by a short continuance, the application of a notice-of-alibi rule's exclusionary sanction violates the Sixth and Fourteenth Amendments to the United States Constitution. The majority, in holding that the state procedural rule overrides the petitioner's right to call his only witness, has denied petitioner the most fundamental constitutional right that exists in a criminal case -- the right to present a defense.

I.

In order to understand better the full impact of the majority's position, it is necessary to recount some of the critical facts in this case.

The petitioner, Vernon Taliaferro, was indicted for robbery with a deadly weapon, use of a handgun in the commission of a felony, and lesser charges which were nol prossed. On the first day of his trial, Wednesday, May 21, 1980, the petitioner requested a continuance in order that one of his witnesses, Carol Bellamy (a former girl friend), could be summonsed to testify. Defense counsel stated that she had been unable to reach Bellamy before the trial, although she had had Bellamy's telephone number for some time, and that she had only obtained her address on the day of the trial. Even though the State had no objection to a continuance, the trial judge denied Taliaferro's request, stating: "The defendant has waited until the day of the trial to give his counsel an address of a witness which is not, in my view, a reason to continue a case, so I will not continue it."[1]

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[1] This ruling, although not before this Court, should be kept in mind in considering petitioner's ability to present his defense.

On the next day of his trial, Thursday, May 22, 1980, the petitioner sought to call Edward Rich, who was then present in the courthouse, as an alibi witness. The State objected on the ground that Taliaferro had failed to name Rich as an alibi witness in response to the State's request made pursuant to Maryland Rule 741. The State claimed that it had been surprised by the last-minute proffer of Rich, was unprepared to cross examine him, and had had no opportunity to investigate his background. The State indicated, however, that it would have no objection to Rich's testifying if the case were continued until the following Monday, May 26.[2]

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[2] The majority suggests that the prosecuting attorney's statement, that a continuance until Monday, May 26, would be sufficient, related only to the time within which Rich's background and connection with the defendant could be checked. The prosecuting attorney, however, was in addition referring to "all sorts of things I can't do on the spur of the moment," before responding: "Monday. That would give me adequate time." Later the prosecuting attorney referred to "put[ting] the case off for a few more days," and he unequivocally stated: "I am willing to go along with that."

The record clearly shows, therefore, that the State believed that a short continuance would be sufficient and would cure any prejudice caused by the violation of the discovery rule. Although the majority appears to second-guess the prosecution in this regard, I believe that the attorney for the prosecution is the best judge of how much time he would need to be prepared to cross-examine the defendant's witness.

The record shows that the trial judge appeared disposed towards continuing the case until he learned that the terms of six of the jurors were to expire on Friday, and that the following Monday was a federal holiday. Nevertheless, Monday was not a state holiday, and the court was required to be open on that day. The judge feared that by resuming the case on Monday, he might disrupt the long-weekend plans of the six jurors whose terms were to expire. The judge, however, made no inquiries to determine whether this fear had any basis. He made no effort to ascertain whether a brief continuance would inconvenience a single juror. Instead, the trial judge simply refused to continue the trial, and ruled that Rich would not be permitted to testify as a sanction for Taliaferro's violation of Rule 741.[3]

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2 (Cont'd.)

Moreover, the trial judge's ruling excluding the witness was not based upon the judge's view that a short continuance would not be sufficient for the prosecution. Instead it was based upon the judge's speculation that jurors might be inconvenienced by a short continuance.

3 The majority speculates that because Prince George's County adjoins the District of Columbia and many of its residents are employed by the federal government, the jurors "might have made plans for the three day federal holiday weekend." Later in the opinion, the majority somehow becomes more certain, referring to "plans which those jurors likely had made for the three day federal holiday." As pointed out above, however, the trial judge made no effort to determine whether any juror had holiday plans for Monday or for any other day. As far as this record shows, not a single juror would have been inconvenienced by a

The trial judge did not find that Taliaferro's violation of Rule 741 was deliberate; instead he found that the defendant was not "diligent" and "hadn't made any real effort, except yesterday, to locate the witness."

After the trial judge's decision excluding Rich as a witness, defense counsel requested a ruling that the State not be permitted to impeach Taliaferro with his prior criminal record if he decided to take the stand in his own defense. The judge denied counsel's request, and the defendant never took the stand.

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3 (Cont'd.)

resumption of the trial on Monday.

Moreover, the record fails to disclose that any of the twelve jurors in the case were federal government employees. The total population of Prince George's County is 665,071. Bureau of the Census, U.S. Dep't of Commerce, No. PC80-1-A22, *1980 Census of Population - Characteristics of the Population: Number of Inhabitants, Maryland* 22-12 (1982). Of this total number, approximately 450,000 persons are over the age of 18 and thus eligible for jury duty. Office of Planning Data, Md. Dep't of State Planning, *Maryland, 1980 Population By Age and Sex* 28 (1982). I have been informed by an official in the Bureau of Economic Analysis, United States Department of Commerce, that 71,912 Prince George's County residents are federal government civilian employees. In light of these figures, there is no basis for drawing an inference, based solely on Prince George's County's proximity to the District of Columbia, that the six jurors whose terms were to expire were likely federal employees.

Ultimately, then, Taliaferro was unable to present any defense to the charges against him. Taliaferro's defense had been alibi, and he had sought to introduce the testimony of two witnesses and to testify himself. Because of the trial judge's evidentiary rulings, Taliaferro's "defense" was reduced to an attack on the credibility of the State's only witness against him.[4]

II.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." In *Washington v. Texas*,

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[4] It is noteworthy that at an earlier stage of the trial, the trial judge had not anticipated that rulings on the admissibility of evidence would be such a major factor in the trial. On the first day of the trial, the judge announced that he was "personally acquainted" with the family of the robbery victim, having known them for twenty years. "I know where they live, have been in their house; they have been in my house." But the judge concluded that he would have "no problem" trying the case "since it is a jury case, and my function, basically, is to determine the admissibility of evidence." If the trial judge had anticipated that his rulings on the admissibility of evidence would determine whether or not a defense would be offered to the jury, his decision concerning the matter of disqualification might have been different.

388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the Supreme Court held that the Sixth Amendment rights to offer testimony of witnesses and to compulsory process are applicable to state criminal proceedings, and that a Texas statute prohibiting accomplices from testifying for each other violated those rights. The Court said (388 U.S. at 19):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

See also In Re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed.682 (1948) (recognizing the right to offer testimony as one of several rights which "are basic in our system of jurisprudence.")

In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), Justice Powell, for the Court, wrote (410 U.S. at 294, emphasis supplied):

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses *and to call witnesses in one's own behalf have long been recognized as essential to due process.*"

In *Chambers*, the Court held that a criminal defendant was impermissibly denied these rights by a Mississippi voucher rule which had precluded him from calling witnesses to discredit one of his own witnesses whose testimony had been damaging.

In the present case, as a result of the trial judge's application of a nonmandatory sanction pertaining to a mere procedural rule, the defendant was precluded from calling his only alibi witness, and thus from presenting his only defense to the state's accusations.[5] Moreover,

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[5] The fact that Rich was the only witness which Taliaferro could have called contrasts with situations in which, for example, a defendant has called numerous witnesses, has presented a substantial defense and seeks to introduce "needlessly cumulative" evidence. United States v. Davis, 639 F.2d 239, 244 (5th Cir. 1981). *See also* United States v. White, 583 F.2d 899 (6th Cir. 1978) (testimony of two alibi witnesses admitted, testimony of third alibi witness excluded for non-compliance with rule); Commonwealth v. LaFrennie, 13 Mass.App. 977, 432 N.E.2d 535 (1982) (same); Commonwealth v. Vecchiolli, 208 Pa.Super. 483, 244 A.2d 96 (1966) (same). In such cases, the ruling, although erroneous, may well be harmless beyond a reasonable doubt. This case is

the violation of the rule was not deliberate, and any prejudice to the prosecution was concededly curable by a short continuance.[6] Finally, the record fails to show that anyone

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5 (Cont'd.)

also distinguishable from those in which the proffered evidence is of limited probative value. *See, e.g.*, United States v. Fitts, 576 F.2d 837 (10th Cir. 1978) (alibi was only for two out of four alleged attempts to cash stolen money orders); United States v. Smith, 524 F.2d 1288 (D.C.Cir. 1975) (alibi given for only one of three alleged heroin sales); Jensen v. State, 36 Wis.2d 598, 153 N.W.2d 566, *modified*, 36 Wis.2d 598, 154 N.W.2d 769 (1967) (alibi was for only two of three counts). Here, however, the constitutional violation could not possibly be considered harmless because the ruling resulted in the exclusion of the defendant's only witness and precluded him from presenting his only defense.

6 In many jurisdictions, as a prerequisite to excluding the defendant's witness for violation of a notice of alibi or witness discovery rule, the trial judge must find either or both that the defendant's violation of the rule was deliberate and that the prosecution would be significantly prejudiced unless the witness was excluded. *See, e.g.*, United States v. White, 583 F.2d 899 (6th Cir. 1978); Hackett v. Mulcahy, 493 F.Supp. 1329 (D.N.J. 1980); State v. Smith, 123 Ariz. 243, 599 P.2d 199 (1979); Bradford v. State, 278 So.2d 624 (Fla. 1973); State v. Davis, 63 Hawaii 191, 624 P.2d 376 (1981) (exclusion proper when defense counsel concedes rule violation was a deliberate, tactical decision); State v. Bright, 229 Kan. 185, 623 P.2d 917 (1981); State v. Bias, 393 So.2d 677 (La. 1981); Commonwealth v. Edgerly, 372 Mass. 337, 343, 361 N.E.2d 1289 (1977); People v. Merritt, 396 Mich. 67, 238 N.W.2d 31 (1976); Williams v. State, 97 Nev. 1, 620 P.2d 1263 (1981); Founts v. State, 87 Nev. 165, 483 P.2d 654 (1971); State v. Smith, 50 Ohio St.2d 51, 362 N.E.2d 988 (1977); State v. Silva, 118 R.I. 408, 374 A.2d 106 (1977);

would have been inconvenienced by a short continuance. This application of a state procedural rule cannot be squared with the mandate of *Chambers*, *Washington* and *In re Oliver*. Under the teaching of those cases, Taliaferro was convicted in violation of the Sixth and Fourteenth Amendments.

The majority opinion rejects Taliaferro's constitutional argument, stating that "state courts and lower federal courts have decided that the exclusion of alibi testimony offered by an accused who has violated an alibi discovery requirement does not offend the Sixth Amendment right to have compulsory process for the obtaining of witnesses." Yet none of the cases cited by the majority hold that exclusion pursuant to a notice-of-alibi rule can never be unconstitutional. In fact, courts have held,

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6 (Cont'd.)

State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931); State v. Grant, 10 Wash.App. 468, 519 P.2d 261 (1974).

Furthermore, several jurisdictions consider the value of the precluded testimony to the defendant's case. *See, e.g.*, State v. Martin, 410 P.2d 132, 137 (Ariz.App. 1966); Commonwealth v. LaFrennie, 13 Mass.App. 977, 432 N.E.2d 535 (1982); State v. Lindsey, 284 N.W.2d 368 (Minn. 1979); Eckert v. State, 96 Nev. 96, 605 P.2d 617 (1980); Counts v. State, supra, 87 Nev. 165; State v. Miner, 128 Vt. 55, 258 A.2d 813, 825 (1969).

on constitutional grounds, that a trial judge cannot exclude a defendant's witness merely as a sanction for a discovery rule violation. *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981) ("We hold, therefore, that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants). *See United States v. Perez*, 648 F.2d 219 (5th Cir. 1981) (error to have excluded witness because of violation of discovery order to reveal reports of physical examinations, but error was harmless). The United States Court of Appeals for the Seventh Circuit has recently held that it is constitutionally impermissible to apply a notice-of-alibi rule so as to preclude the defendant from testifying in his own defense as to an alibi. *Allied v. Gagnon*, 675 F.2d 912 (7th Cir. 1982).

Other courts have held that specific applications of preclusion sanctions violate a defendant's constitutional rights. The United States Court of Appeals for the Second Circuit, for example, held that it is unconstitutional to preclude a defendant from calling witnesses and presenting an insanity defense when formal notice was the only deficiency in complying with the applicable notice rule, and when any prejudice could have been ameliorated by lesser

means than exclusion. *Ronson v. Commissioner of Cor. of State of N.Y.*, 604 F.2d 176 (2d Cir. 1979). The court's reasoning is applicable to the instant case (604 F.2d at 178-179):

> "While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. . . . In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal. . . . Given that a grant of continuance would have served to minimize any prejudice to the state resulting from the lack of formal notice, the refusal of the trial court to exercise discretion to allow [the defendant] to call [his psychiatrist] and to present an insanity defense, then, was a violation of Ronson's sixth amendment rights."

See also the well-reasoned opinion of the United States District Court in the same case, *Ronson v. Commissioner of Correction*, 461 F.Supp. 97 (S.D.N.Y. 1978).

The United States District Court for the District of New Jersey issued a writ of habeas corpus where a prisoner was convicted after a trial in which he was not permitted to introduce alibi testimony. *Seekett v. Mulcahy*, 491 F.Supp. 1329 (D.N.J. 1980). Although the defendant's noncompliance was, as the majority suggests, "technical," the court did not focus on that factor. Instead, the court began by

noting that "[t]he right to present witnesses in one's defense is a fundamental right guaranteed by the Sixth Amendment." *Id.* at 1335. After reviewing the facts, the court concluded that "there is no indication that petitioner waived his constitutional right to present the alibi testimony of witnesses . . . The trial court's refusal to permit the introduction of evidence crucial to petitioner's case visited a terrible punishment on . . . [him]. He was deprived of the right to defend himself." *Id.* at 1340.

The Supreme Court of Washington has indicated that excluding defense witnesses as a sanction for noncompliance with a notice requirement may be unconstitutional. In *State v. Martin*, 165 Wash.180, 187, 4 P.2d 930 (1931), the court stated:

> "If, in such a case as this, the state should claim surprise [resulting from noncompliance], it might become the duty of the court, not to declare that the appellant's evidence should not be received, but that the state should have a reasonable opportunity to prepare itself against surprise; for the constitution, by guaranteeing an accused person the right to defend himself and to compel the attendance of witnesses by the court's own process, necessarily gives him the right to have attending witnesses heard."

Many other cases have recognized the existence of constitutional problems in applying the preclusion sanction for violation of notice-of-alibi provisions. *See, e.g., United*

A-42

States v. Barron, 575 F.2d 752, 757 n. 5 (9th Cir. 1978); *Brown v. Wainwright*, 459 F.Supp. 244, 247 (M.D. Fla. 1978); *People v. Jackson*, 71 Mich.App. 395, 399, 249 N.W.2d 132 (1976); *Commonwealth v. Edgerly*, 372 Mass. 337, 343, 361 N.E.2d 1289 (1977); *State ex rel. Sikora v. District Ct.*, 154 Mont. 241, 462 P.2d 897, 903 (1969); *People v. Morales*, 37 N.Y.2d 262, 269-270, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975); *State v. Smith*, 50 Ohio St.2d 51, 52 n. 2, 362 N.E.2d 988 (1977); *State v. Wolfe*, 273 Or. 518, 525, 542 P.2d 482, 486 (1975); *State v. Silva*, 118 R.I. 408, 374 A.2d 106, 108 (1977).[7]

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[7] Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), held that notice of alibi provisions do not violate the Fifth Amendment's self-incrimination clause, although, as previously discussed, the Court reserved ruling on the sanction of excluding the defendant's evidence. Nevertheless, two states have declared notice-of-alibi provisions violative of state constitutional privileges against self-incrimination. In Alaska, the Supreme Court held that the state's notice of alibi provision violated that state's constitutional privilege against self-incrimination to the extent that the provision required more than mere notice of intent to present an alibi defense. The court held that beyond simple notice, the state could not compel the defendant to disclose any details of his defense such as who his witnesses are and where he was if he was not at the crime scene. Scott v. State, 519 P.2d 774 (Alaska 1974). Similarly, in Allen v. Superior Court, 18 Cal.3d 520, 134 Cal. Rptr. 774, 557 P.2d 65, 67 (1976), the Supreme Court of California held that the self-incrimination clause of the constitution of that state prohibits compelled pretrial disclosure to the prosecution by a defendant if the disclosure "'conceivably might lighten the prosecution's burden of proving its case in chief.'"

While some of the above-cited cases have left the constitutional issue undecided, none of them has involved a situation as extreme as that in the present case, where the judge excluded the defendant's only witness, thus precluding the defendant from presenting any defense, without finding that the failure to comply was deliberate, and where any

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7 (Cont'd.)

In an earlier decision, the California Supreme Court struck down a judicially-created notice of alibi requirement, thereby rejecting the efforts of some lower courts in that state to create a common-law notice requirement. Reynolds v. Superior Court, 12 Cal.3d 834, 117 Cal. Rptr. 437, 528 P.2d 45 (1974). In explaining its hesitation to create or sanction notice of alibi measures, the court gave particular weight to potential constitutional problems:

> "[C]omplex and closely balanced questions of state and federal constitutional law are presented by a notice-of-alibi order. . . . [O]ur decision that it would be inappropriate for us to declare judicially a notice-of-alibi rule does arise from our sensitivity to the constitutional constraints on the power of the courts or the Legislature to require a defendant in a criminal case to reveal to the prosecution in advance of the normal course of trial tangible or intangible trial-related evidence or other material." Id. at 837.

The Maryland Declaration of Rights also contains a provision guaranteeing citizens the right against self-incrimination. Article 22 states: "That no man ought to be compelled to give evidence against himself in a criminal case." This Court has never ruled on the issue of whether Rule 741 may be partially invalid because it compels criminal defendants to give evidence against themselves contrary to Article 22. Because the parties have not raised the issue, it is not before us in this case, and I express no views on the matter.

A-44

disadvantage to the prosecution was admittedly curable by a continuance.

In addition, commentators have taken the position that exclusion of the defense witnesses, as a sanction for violating a discovery rule, presents serious constitutional problems. Professor Clinton, for example, concludes that

> "applying the preclusion sanction to the accused would in most cases be constitutionally suspect. The application of the preclusion sanction . . . should survive constitutional challenge only when the evidence excluded is not very important to the accused or, in the usual case, where other means of effectuating the state's interest are practically unavailable." Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 839 (1976).

See also Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 137-138 (1974); Note, *The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342 (1972). *See generally* Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972). The American Bar Association, II *ABA Standards for Criminal Justice*, § 11-4.7(a) (2d ed. 1980), rejects the exclusion sanction on both policy and constitutional grounds.

If excluding a criminal defendant's witness for a violation of a discovery rule ever infringes upon the Sixth Amendment, it does so in the present case. The defendant's only defense was alibi, and the excluded witness was his only alibi witness. The prosecution's case was based upon the identification testimony of a single witness, who had initially identified the photograph of someone else as the perpetrator of the crime, who was a police informant, and who had a criminal record. The only issue before the jury should have been to decide which of two witnesses was telling the truth -- the prosecution's identification witness or the defendant's alibi witness. But, because of the trial judge's ruling excluding the defendant's evidence as a sanction for violating a discovery rule, the jury heard only the prosecution's witness. To reiterate, the violation of the discovery rule was not deliberate and was admittedly curable by a short continuance. Under these circumstances, the defendant simply did not receive a fair trial.

The majority takes the position that the decision to prohibit the defendant's witness from testifying was within "the discretion" of the trial court. In my view this is true only if a trial court has "discretion" to abridge the Sixth Amendment right to present a defense. I would reverse the conviction and award Taliaferro a new trial.

Judges Cole and Davidson have authorized me to state that they concur with the views expressed herein.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1980

No. 1175

VERNON THADDEUS TALIAFERRO

v.

STATE OF MARYLAND

Morton
Melvin
MacDaniel,
JJ.

Per Curiam

Filed: July 31, 1981

A-48

On May 22, 1980, Vernon Thaddeus Taliaferro, the appellant, was convicted by a jury in the Circuit Court for Prince George's County (McCullough, J.), of robbery with a deadly weapon and the use of a handgun in the commission of a crime. On August 18, 1980, he was committed to the custody of the Division of Correction for twelve years for the robbery with a five year concurrent sentence for the handgun offense. On appeal he contends:

1. the court erred in failing to grant a mistrial.

2. the court abused its discretion in excluding certain testimony.

The record before us shows that at about 9:00 P.M. on Saturday, September 1, 1979, when John Parker responded to a knock on his front door, two men forced their way at gunpoint into his house. Parker was tied up. The intruders ransacked a bedroom and other areas of the house. One of the men had a gun and fired a shot during the robbery.

I. Mistrial

Appellant first contends that the court erred in refusing to grant a mistrial after a police officer who testified for the State made reference to other crimes committed by appellant. The basis for the appellant's argument is that the court had granted a motion *in limine* when the appellant requested that the State not be allowed to introduce any evidence regarding the fact that he had been at the Howard County detention center. The

request was precipitated by the fact that the photographs which the State proposed to introduce as exhibits bore notations which indicated their origin in Howard County. The court granted the motion. The State obliterated the notations on the photographs and cautioned the police officer not to refer to their origin.

In spite of all the foregoing, the officer testified:

> "Q. Was [the picture] shown to Mr. Parker?
>
> A. Yes, sir. That was shown on November 29. The color polaroids that we take depict the defendant a little better. Also, these were from a neighboring jurisdiction."

The appellant promptly moved for a mistrial. In ruling on the motion, the court said:

> "I am not going to grant a mistrial. I am going to keep this trial going, but it seems incredible the officer is told not to mention that and he comes right out and mentions it. In any event, I am not going to grant a mistrial. I am not going to interrupt the testimony at this time. The motion for mistrial is denied."

Now on appeal the appellant contends that the court should have granted a mistrial.

We have reviewed all the testimony and consider that the words "These [photographs] were from a neighboring jurisdiction" are not evidence of other criminal offenses. See Cooper v. State, 14 Md. App. 106 (1972), Bowman, Brooks and Harris v. State, 16 Md. App. 384 (1972) and Austin v. State, 3 Md. App. 231 (1968).

In Wilhelm v. State, 272 Md. 404, 429 (1974), the Court of Appeals said:

> "A request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion, in a case involving a question of prejudice which might infringe upon the right of the defendant to a fair trial, is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the trial court in denying the mistrial. The decision by the trial court in the exercise of its discretion denying a mistrial will not be reversed on appeal unless it is clear that there has been prejudice to the defendant." (citations omitted)

Although we do not condone the conduct of the officer, particularly after the State had cautioned him not to mention the subject, we do not, for the same reasons as set forth in Wilhelm v. State, supra, consider that the court abused its discretion in denying the appellant's motion for a mistrial.

II. Excluded testimony

Immediately prior to the commencement of the trial on May 21, 1980, the appellant's trial counsel advised the court that a defense witness, Karen Belamy, had just been located. The appellant's trial counsel then said:

> "I would request the court to continue his case in order to issue a witness summons for Karen Belamy, who lives in Baltimore. He gave me the street address. I have told Mr. Bonsib [Assistant's State's Attorney] I would be asking the court for a continuance on his behalf, and he indicated to me he would have no particular objection if the defendant was willing to waive the Hicks implications."

The court refused to grant the continuance.

At 1:30 P.M. on May 22, 1980, the State rested its case The appellant's trial counsel advised the court that it had been unable to get Karen Belamy to trial but had been able to secure the presence of one Edward Rich whom the ap-

pellant now wished to call as a witness in her stead. The State objected on the grounds that Rich would be an alibi witness and that his name had not been provided to the State in the discovery process. The appellant's trial counsel replied:

> "I do realize it calls for production of alibi witnesses. I think it would be a gross injustice to this defendant, it would be a violation of due process and his rights to a fair trial to not allow his alibi witness to testify."

The appellant's trial counsel advised the court that the State had talked to Rich prior to commencement of the afternoon session.

The court asked the State what else it had to do. The following colloquy then occurred:

> "MR. BONSIB [Assistant State's Attorney]: For one thing, I would have had the police department run a record check on him, try to determine where he lives, what connection he has had with this defendant, or the co-defendant in the past, all sorts of things I can't do on the spur of the moment. I may not come up with anything.
>
> THE COURT: How long do you need to do that?
>
> MR. BONSIB: Monday. That would give me adequate time."

After some further discussion, the appellant's trial counsel made the following proffer of Rich's testimony:

> "May it please the court, I would like, at this time, to ask that the court give the state the opportunity to do whatever it has to do to investigate fully my alibi witness. His name is Edward Rich, Jr., and I would like to proffer his testimony at this time, so that the state may be aware of it, and that is, that on approximately August 22 of 1979, Mr. Rich, who is the alibi witness, who is present in the courtroom, suffered

> an injury to his upper and lower back, his hip, and his head. From August 22, for a period of approximately three months, he was confined to his house recovering from the injury. He is under the care of a Dr. Lippman at 809 N. Charles Street, in Baltimore, and a Dr. Nepkin of the same street address. He is still under those doctors care. If the state intends to impeach him by first the significance of that, his testimony would be that during at least the first three or four weeks, my client was at his house each evening helping him to be moved about as had to be done, playing chess with him, assisting him, and generally keeping him company, and he knows that on September 1, that my client was there with him so engaged. Mr. Rich will supply to the court, or for the State's Attorney his date of birth, if it is necessary. I understand that is necessary in order to run a record check."

The State still objected and the court ruled that, as a sanction for not complying with the discovery rules,[1] Rich would not be allowed to testify. The following colloquy then occurred between the court and the appellant:

> " THE DEFENDANT: If the court will permit, Your Honor, like I was telling Ms. Perry, my lawyer, we had a preliminary or pretrial hearing with Mr. Bonsib, and he knows that I had informed him that I had a witness. I could not get in contact with her --
>
> THE COURT: I don't mean to cut you short, but I am not going to go back into my ruling on the alibi witness."

Obviously the witnesses' testimony was relevant and the witness was present in the court. That the appellant had not complied with Md. Rules 741 d 3 and Md. Rule 741 g seems to be conceded although the extent of the State's purported lack of knowledge about an alibi witness may be debatable. In any event the

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1. Maryland Rule 741.

matter was one which the rules leave to the court's discretion.

In ruling on the matter the trial judge stated:

> "THE COURT: This defendant was indicted on December 21, 1979. He was arraigned on January 3, 1980. Counsel entered her appearance on January 8, 1980. On March 3, 1980, a notice was sent indicating this case would be set for trial on May 21, 1980. The defendant has known since he was indicted that his defense would be alibi. On the second day of trial, the defendant notifies the State's Attorney that they now have an alibi witness. Rule 741 (d) (3) requires that a defendant, 'upon designation by the State of the time, place and date of the alleged occurrence, shall furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request'.
>
> * * *
>
> I originally thought it may be a due process problem. I now don't think that. I think there was a process here to be followed, and that the defendant failed to follow it. I think it is unfair to the state now to permit the alibi witness, even though it is the only defense witness. I think the sanctions under the 400 rules would be the sanctions under this rule. In other words, the court would have the discretion as to whether or not to permit an alibi witness to testify. I am going to exercise that discretion and refuse to permit the defendant to call his alibi witness for his failure to comply with Maryland Rule 741 (d) (3)."

In our view we cannot say, under the circumstances present here, that the trial judge abused his discretion in applying the sanction he did. The appellant

had to have known for some months of his trial date; he also knew of his alibi witness by name and even if that witness had moved there seems to be no reason why at least that name could not have been given to the State.

Finding no error, we shall affirm.

JUDGMENTS AFFIRMED;
COSTS TO BE PAID BY APPELLANT.

AFTERNOON SESSION

(Trial in the above-entitled matter was resumed at 1:30 p.m., at the expiration of the recess, and the following proceedings were had in the presence of the jury:)

MR. BONSIB: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Whereupon, counsel approached the bench and the following proceedings were had out of hearing of the jury

MR. BONSIB: Your Honor, the witness that Ms. Perry, I think, proposes to call, is an alibi witness. Today when she indicated she was going to be calling him was the first time I had notice of an alibi witness. On February 1, 1980, I filed the state's motion for discovery, asking that the defense produce the names of any witnesses they proposed to call as alibi witnesses. I do not believe Ms. Perry has given me the opportunity -- a couple of minutes before court I started to talk to the gentleman -- I do not believe that gives me fair opportunity to pursue this gentleman's background to investigate the evidence that he proposes to give, and if necessary, to get any rebuttal witnesses to his testimony. This has been approximately three, four, five months since I filed this request for discovery. To have this put on at the last minute, I think, defeats the whole idea of giving the state the right to discovery of

this type of information. Five minutes before trial does nothing to allow me to prepare to rebut that sort of evidence. I would ask that the court preclude the witness from testifying. The state, as the court well knows, has always bee held to this type of burden when they fail to complete discovery, and I think the defense should be held to the same burden.

MS. PERRY: If it please the court, Your Honor, I did not, myself, know what the man would testify to until he just came. Mr. Taliaferro went up and picked him up. He is an acquaintance of my client. I had asked him for witnesses previously, and he gave me the name of Caroline Bellamy, who was a girlfriend. We weren't able to get her here. As I told the court, I didn't have an address for her. She can't be here today. Mr. Taliaferro called a Mr. Rich and was able to get him here. Now, there are no sanctions that I am aware of provided for in the seven hundred rules for failure to comply with the motion for discovery and inspection. I do realize it calls for production of alibi witnesses. I think it would be a gross injustice to this defendant, it would be a violation of due process and his rights to a fair trial to not allow his alibi witness to testify. Now, Mr. Bonsib, as soon as I was finished talking with Mr. Rich, I told him to talk with Mr. Bonsib, and he spoke with him out of the presence of

Mr. Taliaferro. He, basically, told him what he would testify to, and he asked him specifically if he had been convicted of a crime, which, I think, is what Mr. Bonsib was referring to, if he had been convicted of a crime. He told him about that, and I think that we have sufficiently allowed the discovery. I know, on occasions, I have had witnesses come in that I didn't know about before, and I have been allowed, at the time, to talk with them and I have not had an opportunity to check to see if they have criminal convictions or to check their backgrounds. The court has allowed me a continuance or a short time in which to speak with them, and that has been it, and I would ask that Mr. Rich be allowed to testify.

MR. BONSIB: I would point out that an alibi witness is recognized by these rules as different from another type of witness. The state has the obligation, if the defense produces alibi witnesses, to produce its rebuttal witnesses if request is made for them. I am certain the court would not allow them to testify if we had not provided them. To say the state is allowed means of discovery and yet failur to provide it, there is no sanction. Merely providing it five minutes before trial is really not providing it sufficiently in advance for the state to make any meaningful use of the information. If the rules are not to be a force, I think the court has to impose the sanction of exclusion of

the witness.

THE COURT: Is that the sanction?

MS. PERRY: It is not provided for in the rules.

MR. BONSIB: I think it is the logical sanction. What else would the rule mean? It could be flaunted at every turn if it didn't mean that.

THE COURT: I know what the rule says, but I am saying, is that the only sanction?

MR. BONSIB: That is the only sanction that would be a meaningful sanction. The Court of Appeals and the Court of Special Appeals now are holding the state to the letter of the law and so many of the different rules where there is no specific sanction provided for, the courts are imposing dismissal or exclusion. The courts have been holding almost routinely that these rules are meant for a purpose, and the only way to insure the purpose is to put sanctions that have teeth in them. To hold the state to one standard and the defense to another, I don't think is fair. We might as well wipe out the requirement.

THE COURT: The only other alternative is to continue this case and give you an opportunity to make whatever investigation you have to make to determine whatever you want to determine about this witness. I agree you should have had it way before now, and this comes at a very late time, but, also, this gentleman is facing a rather

serious charge, and if convicted, may face a very substantia
period of incarceration. I think you have to balance one
against the other, fairness to the state and fairness to the
defendant, even though he has violated the rules. So, lets
assume you had his name last week -- what could you have don
or what would you have done?

MR. BONSIB: For one thing, I would have had the police department run a record check on him, try to determi where he lives, what connection he has had with this defendant, or the co-defendant in the past, all sorts of things I can't do on the spur of the moment. I may not come up with anything.

THE COURT: How long do you need to do that?

MR. BONSIB: Monday. That would give me adequate time.

THE COURT: We may have to do that.

MR. BONSIB: Let me just check my schedule. Monda is Memorial Day.

THE COURT: I wonder how many of these jurors are due back to work next week. We are going to lose some of them if they have a holiday Monday and they are not due back I might inquire how many of them would have more time to serve, and then make a decision.

Ladies and gentlemen of the jury, how many of you are winding up your jury service this week?

That ends that. Six people put their hands up.

MS. PERRY: Is your investigation going to concern itself just with checking with the police?

MR. BONSIB: I am not sure exactly, depending on what we may determine, it may require me to consider rebuttal witnesses. I am just not certain, but I had no reason to believe there were going to be any alibi witnesses in this case, and I would just like to sit down and think about it.

THE COURT: You have one alibi witness, plus the defendant?

MS. PERRY: He is not going to testify.

THE COURT: The only witness you have is the alibi witness?

MS PERRY: That is the only witness I have. What about letting him testify, letting him go ahead and testify, because he has got a kind of an injury, he is a little uncomfortable, and then carry it over for rebuttal?

MR. BONSIB: The whole problem is I cannot perform the kind of cross examination, I can't intelligently cross examine a man that just pops up at the last minute. I think that is the whole purpose of the rule, for me to have the opportunity to prepare cross examination, not have surprise witnesses presented where we don't have a chance to verify their stories.

THE COURT: This is going to boil down to the

victim versus -- since you are saying the defendant is not going to testify -- it is going to be the victim's testimony versus the alibi witness.

MS. PERRY: That is right.

THE COURT: That is what it is going to boil down to.

MR. BONSIB: It is quite obvious Ms. Perry had substantial time to prepare her cross examination of my victim, go into his background, go into the facts of the case. I certainly want an equal opportunity to represent the state.

THE COURT: I have to try to be fair not only to th defendant but I have to try to be fair to the state, too. I don't think what is happening here is being fair to the state. All of a sudden this defendant, and I don't know how long his trial date has been set, but it has been set for sometime --

MR. BONSIB: Ever since March.

THE COURT: March, April, May, two months, now. The second day, the last minute of the trial, he comes up with an alibi witness. I am going to take the bull by the horns --

MS. PERRY: He is also an extremely credible alibi witness.

MR. BONSIB: That is something yet to be determined

THE COURT: Is he credible? I don't know. How come he shows up at the last minute when this man has known for two months when this trial date is. That doesn't make him too credible to me.

MS. PERRY: I don't know when he talked to him. I know he tried to call him yesterday, tried to call the girl yesterday.

THE COURT: This is his fault, not yours.

MS. PERRY: I realize that, but I do have to represent him, and criminal defendants are not probably -- I don't want to say, as conscientious -- but are a little less concerned about the rules we were talking about, than if we were involved with a civil case. If you don't have a witness here, don't have information, you are kind of out of court kind of thing. He asked for the continuance on the first day.

THE COURT: The same reasoning would apply to that, too. You just don't come in the first day of trial and say, I am sorry, I now have a witness. You don't do it that way, and I can't apply the rules any differently to this defendant than I apply them to anybody else. They have to be applied equally.

Mr. Bailiff, do we have a courtroom to send this jury to?

THE BAILIFF: Yes, we do.

THE COURT: I mean a jury room to send this jury to?

MR. BAILIFF: Yes, Your Honor.

(Whereupon, counsel returned to the trial tables and the following proceedings were had in open court in the hearing of the jury:)

THE COURT: I am getting tired of whispering. I think we will send you to the jury room so we can talk about this in a better tone. I would ask you to retire to the jury room.

(Whereupon, the jury retired from the courtroom and the following proceedings ensued out of their hearing and presence.)

THE COURT: Are counsel aware of any cases that have ruled on this point?

MR. BONSIB: I am not aware of any cases specifically on this point, Your Honor, just the general cases that talk about interpretation of the rules and how they have been enforcing them.

MS. PERRY: When the language of the rule is "shall", and is mandatory, then the courts have been applying sanctions, but they have not, in the criminal cases I am familiar with, ever applied sanctions that "your witness will not be allowed to testify because you did not give me his name", in all of the time I have been doing it. I get, "You go out in the hall and talk to them now sort of thing".

THE COURT: When I practiced law, if I didn't get the name of the witness in the interrogatories to the state in a criminal case, I have had judges then refuse to let the state call witnesses.

MS. PERRY: I have never had that happen to me.

THE COURT: It was done to me or I did it to the state, lets put it that way. What rule was that again?

MR. BONSIB: 741(d), the discovery rules, under the state's discovery section.

THE COURT: I think 741(d)(1) -- were you saying that it wasn't prefaced by the word, "shall"? The rule was not mandatory because it wasn't prefaced by the word, "shall"?

MS. PERRY: I believe I did, but I think I am mistaken.

THE COURT: Because it says, "Upon the request of the State, the defendant shall:

1. Generally.

Do certain things.

2. Reports of Experts.

3. Alibi Witnesses."

All of them appear after the word, "shall", so I think it is mandatory that the defendant must do this. The only question is what sanction should be imposed for his failure to do it, and there is only two alternatives.

Number one, prevent the witness from testifying for the defendant's failure to comply with the rule.

Number two, grant a continuance to give the state an opportunity to investigate the alibi witness.

Neither one of those alternatives are very enticing to the court. I don't like either one of them. I want to get this case tried. I want to make sure everybody has a fair shot, including the state and the defense, but we have certain rules to comply with, and obviously, the defendant has not complied with the rules.

MS. PERRY: May it please the court, I would like, at this time, to ask that the court give the state the opportunity to do whatever it has to do to investigate fully my alibi witness. His name is Edward Rich, Jr., and I would like to proffer his testimony at this time, so that the state may be aware of it, and that is, that on approximately August 22 of 1979, Mr. Rich, who is the alibi witness, who is present in the courtroom, suffered an injury to his upper and lower back, his hip, and his head. From August 22, for a period of approximately three months, he was confined to his house recovering from the injury. He is under the care of a Dr. Lippman at 809 N Charles Street, in Baltimore, and a Dr. Nepkin of the same street address. He is still under those doctors care. If the state intends to impeach him by first the significance of that, his testimony would be that

during at least the first three or four weeks, my client was at his house each evening helping him to be moved about as had to be done, playing chess with him, assisting him, and generally keeping him company, and he knows that on September 1, that my client was there with him so engaged. Mr. Rich will supply to the court, or for the State's Attorney, his date of birth, if it is necessary. I understand that is necessary in order to run a record check.

The only other thing that I can see, were I in the State's position, would be to determine if, indeed, he was laid up, if I can use those words, and if the doctors can verify that he was. The information is there, and it seems to me a couple of simple telephone calls would provide that investigation, and as soon as the state knows, then we could continue with this case. It can be done, I think, today. Mr. Rich will call and have the doctor verify it if that is what Mr. Bonsib requires.

MR. BONSIB: I think there is a little more involved than a mere record check. Without going into the specifics of exactly what I would like to do, because the defendant and the witness are present, I would like to be able, among other things, to sit down and figure out what kind of cross examination I would prepare, based upon the information that he was with the defendant, in addition to his record, in addition to his ailment. There may be other factors I would

like to check out. I am not trying to dilly-dally. If the court wants to continue it, it is fine with me, but to go forward right now, I don't think it is fair, and I would certainly object to him testifying, at this time.

I would point out, you know the matter has been pending since the trial has been set, before March, the beginning of March of 1980. To come in at the last minute and now expect to be able to put the case off for a few more days, I am willing to go along with that, but for the defense to expect — I am sure it is not Ms. Perry's fault, but for the defendant to come in and give her the name of a witness at the very last moment is just not the way the rules are intended this thing should work. If he knew about this, he should have known about it a long time ago, and if he didn't do it, he would have to suffer the consequences, as the state would in an identical situation, and dare say the court would have more difficulty continuing it for the state than the defendant. We all try to bend over backwards for the defendant. The rules are made to be followed, they were not followed, and in this case, proceeding, now, with this witness, I don't think is fair, and I am not prepared to do what I think is a proper job of dealing with this witness, at this point.

THE COURT: I will admit that a strict enforcement of the rule may interfere with due process, and that is what

is bothering me.

MR. BONSIB: I think the Supreme Court, in the cases that have dealt with the requirements of defendants to produce alibi witnesses, have dealt with those kinds of questions and have determined they do not. The defendant was given adequate notice, adequate opportunity. Due process requires no more than he be notified of the situation, and I think under the rules they were notified what would happen.

THE COURT: Anything else from anybody?

MS. PERRY: No.

THE COURT: Madam Clerk, you can announce a ten minute recess.

(At this point, a brief recess was taken).

THE COURT: All right. Where is the defendant?

MS. PERRY: He is right outside, Your Honor. I asked his father to get him.

When did you find out, Mr. Bonsib, about this alleged alibi witness?

MR. BONSIB: I knew there was going to be a witness when we took a recess this morning. I found out there would be an alibi witness sometime thereafter. The name of the actual person, I didn't find out until five minutes before we came back this afternoon, about twenty-five after one.

THE COURT: Anything else you wish to proffer as to what the alibi witness would testify to, Ms. Perry?

MS. PERRY: Yes, sir. The witness would testify that basically he can cover the whole period of time that we are talking about that this incident occurred on September 1. My client was with him, helping him out at his home in Baltimore. Mr. Taliaferro has been unable to physically locate and speak with this man, Mr. Rich, who is in the courtroom until today. He has been attempting to locate him. As soon as he was well, he moved from his home, and he went to live somewhere else. He now lives at a different address, which I have. Mr. Taliaferro did not know his address and could not give it to me, nor could I give it to the state.

Your Honor, we feel that the discovery rules are continuing, and they apply to knowledge that a person has. If you don't have it at the time, within the time required by the rules, then, obviously, you cannot supply it. We just feel that it would be grossly unfair to this man to just say that the only witness that he has cannot testify.

THE COURT: All right. Anything else?

MS. PERRY: No.

THE COURT: This defendant was indicted on December 21, 1979. He was arraigned on January 3, 1980. Counsel entered her appearance on January 8, 1980. On March 3, 1980, a notice was sent indicating this case would be set for trial

on May 21, 1980. The defendant has known since he was indicted that his defense would be alibi. On the second day of trial, the defendant notifies the State's Attorney that they now have an alibi witness. Rule 741(d)(3) requires that a defendant, "Upon designation by the State of the time, place and date of the alleged occurrence, shall furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request".

The state made a request. The defendant did not answer it. He answered with no name, no alibi witness. Is that correct?

MR. BONSIB: I don't recall it was not answered. One or the other, it was not answered, or there was no alibi witness.

THE COURT: I originally thought it may be a due process problem. I now don't think that. I think there was a process here to be followed, and that the defendant failed to follow it. I think it is unfair to the state now to permit the alibi witness, even though it is the only defense witness. I think the sanctions under the 400 rules would be the sanctions under this rule. In other words, the court would have the discretion as to whether or not to permit an alibi witness to testify. I am going to exercise

that discretion and refuse to permit the defendant to call his alibi witness for his failure to comply with Maryland Rule 741(d)(3).

MS. PERRY: Your Honor, would you hear us just one moment further? I realize you have ruled already.

THE COURT: No, once I have ruled -- I gave everybody all of the time they wanted to say whatever they wanted to say.

MS. PERRY: Then, would you please hear us on a motion in limine with regard to a prior record, so that the man might testify in his own behalf?

THE COURT: Yes. I thought you were talking about the alibi witness. I am not preventing you from saying anything new to me about some other subject. I will listen to you on the motion in limine.

MS. PERRY: The reason my client is not taking the stand is because he has, I believe, two prior convictions. That is a matter of record. We gave the court that information, or the state did, during the pretrial. This man is faced with 20 years on the armed robbery plus 15 for use of a handgun in the commission of a felony. If he takes the stand and testifies, then, without limiting the state, it can cross examine him and ask him about prior convictions, and he has one in 1972 for larceny, 1974 robbery with a deadly weapon. We would like to ask the court,

because of the highly prejudicial nature of that kind of evidence, him being the only witness that he has, that the state be limited and not be allowed to bring that evidence out, in lieu of the alibi witness, and also that the state not be allowed to ask the question of my client on the stand, nor to argue it, where is your alibi witness.

THE COURT: Would you intend to say anything about any alibi witness, if you cross examined him?

MR. BONSIB: Well, I don't know, Your Honor. I can't say, at this point. I certainly will try to steer clear of it.

THE COURT: No. I am just trying to find out whether I have to make a ruling, if you are going to say, you don't know, or you have to use it, then I will make a ruling.

MR. BONSIB: Let me not say I am not going to do it then, unless you make a ruling.

THE COURT: Say that again?

MR. BONSIB: I can't tell you for sure what I am going to do.

THE COURT: Motion in limine granted as to the failure to call the alibi witness. What about the record?

MR. BONSIB: The record is one of moral turpitude. Ms. Perry made an issue of my victim's prior record, that he had been convicted of a 3&2.

MS. PERRY: You didn't object.

MR. BONSIB: I know when an objection is well founded. In this particular case, I think the issue of credibility is obviously the key issue in this defense, and the defendant's prior record for armed robbery certainly goes to his believability and credibility. We would strenuously argue it is proper and we should be allowed to cross examine the defendant on it.

THE COURT: Anything else?

MS. PERRY: No.

THE COURT: The motion in limine as to the prior record is denied.

MS. PERRY: May I have the court's indulgence one moment.

We would rest, at this time, Your Honor. The defendant cannot testify, and the motion in limine that you granted for us with regard to alibi has no application, at this time. He cannot testify in his own behalf.

THE COURT: He can testify in his own behalf. He chooses not to.

MS. PERRY: That is because I know what the prejudicial effect of that is going to be.

THE COURT: But he can testify.

I want to make sure you have discussed with him his right to testify.

MS. PERRY: He knows that.

THE COURT: And his waiver of his constitutional right to testify in his own behalf. Do you waive that, sir?

THE DEFENDANT: If the court will permit, Your Honor, like I was telling Ms. Perry, my lawyer, we had a preliminary or pretrial hearing with Mr. Bonsib, and he knows that I had informed him that I had a witness. I could not get in contact with her --

THE COURT: I don't mean to cut you short, but I am not going to go back into my ruling on the alibi witness. I want to make sure you understand that you have a right to testify. If you choose not to do that --

THE DEFENDANT: Judge McCullough, I don't understand one thing. Okay, I am not familiar with Law, as you are. Okay, she explained it to me already, that she already argued that point. However, the point I am trying to express to you, Mr. Bonsib, here, and Judge Melbourne were present when I informed them that I had a witness. I could not contact her. Right?

THE COURT: Mr. Taliaferro, again, I have ruled on the alibi, and I don't wish now to debate that with you. All I am trying to find out now is if you want to take the stand in your own behalf.

THE DEFENDANT: Judge McCullough, I understand what you are saying --

THE COURT: Don't interrupt me, please. If you are

called to the stand to testify, which you have a right to do, the state will be permitted to ask you about your prior record on cross examination, so that the jury will have the benefit of your record to use that, if it is of any use to them at all, on your credibility.

Your attorney has said to me you choose not to testify because you are afraid of that. That is perfectly all right. I just want to make sure that you understand that you have a right to take the stand and testify in your own defense and you have made the judgment you don't want to do so. That is all I want to find out. If you want to testify, fine. If you don't want to testify, fine. The choice is solely yours.

THE DEFENDANT: So what you are asking me is whethe or not I want to testify?

THE COURT: Yes, sir. That choice is only yours to make, after you listen to your lawyer, and after you have listened to what I say, it is your decision alone to mak That is the only thing I am asking you.

THE DEFENDANT: What about the things that I don't understand. You know, I understand that perfectly clearly.

THE COURT: Lets get over this first.

THE DEFENDANT: I am going by what my lawyer says. I agree with whatever she says which is I will not testify.

THE COURT: You have made that decision?

THE DEFENDANT: I am going by what she says.

THE COURT: All right.

THE DEFENDANT: Now, if you can explain and clarify that point, why can't you explain and clarify the point that I am trying to get over to you, Your Honor, which is, I don't understand the alibi witness, when I said I had a witness, although I never had a chance to inform the witness that I was coming to court, I never had a chance to contact her. This is what I am saying. Although you ruled on this situation, which I don't understand. You know, it is only fair to me if you can explain one thing, why not explain the other?

THE COURT: I thought I explained it rather well for the record, and if you didn't understand it, I am sorry, but I don't intend to go back and explain it again, or how I ruled. I have made a ruling, sir, and I am sticking by that, and in the event I am in error, there is somebody higher than I that can correct that.

Anything else, Ms. Perry?

MS. PERRY: No, sir.

THE COURT: Then, we are ready to go to the jury?

MR. BONSIB: Yes, Your Honor, the state is ready.

MS. PERRY: I would like to make my motion for judgment of acquittal.

THE COURT: Any further argument on that?

MS. PERRY: No.

THE COURT: Motion denied.

MR. BONSIB: Your Honor, the state would abandon a nol pros counts 3, 4, 6 and 8, leaving to the jury armed robbery, robbery, grand theft and use of a handgun.

THE COURT: What counts did you say you are going with?

MR. BONSIB: Count 1, armed robbery; Count 2, robbery, Count 5, grand theft, and Count 7, use of a handgun

THE COURT: Do counsel have instructions you wish me to go over? If you have, I am going to recess and go ove them in chambers with you.

MS. PERRY: The only one I want is the one from the criminal jury instructions about missing witnesses and credibility of witnesses.

THE COURT: Missing witnesses?

MS. PERRY: Yes.

THE COURT: I will see you in chambers in two minutes. The court will stand in recess.

(At this point, a brief recess was taken).

THE COURT: Ms. Perry, I will give you the opportu if you like, to put in the record the efforts that the defendant has made over a period of whatever time to locate and produce this alibi witness because I don't know that the is anything in here to indicate what, if anything, he has do

and depending on that, it is a matter of diligence as far as I am concerned, and if diligence has been rewarded, as of today, that may be one thing. If there is no diligence, that may be another thing. If there has been some diligence but not much, that would be another thing.

MS. PERRY: Would you hear from Mr. Taliafero on the stand?

THE COURT: Yes, under oath.

MR. BONSIB: I would ask this prospective alibi witness be excluded.

THE COURT: All right. Exclude the witness.

Whereupon,

VERNON THADDEUS TALIAFERRO

the plaintiff herein, in his own behalf, was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. PERRY:

Q Mr. Taliaferro, could you please tell His Honor your full name?

A Vernon Thaddeus Taliaferro.

Q And could you please tell his Honor when, what efforts you made to locate your witnesses in this case to bring them to court today?

A I tried to locate my witnesses by making several

phone calls and also going past their residences. In the process, I found that my initial witness that the State's Attorney is aware of, I could not get in touch with her because like she resides with her mother at times, and also she has a private residence and I couldn't get in touch with her, although, on occasion, she had called me to ask whether or not Ms. Perry was going to get in touch with her. Her name is Ms. Caroline Bellamy. As far as Mr. Rich is concerned the witness that is here today, I got in contact with him, I think it was in, lets see, I guess it was around December, and I informed him of the situation that I was in and he was willing to come to court today, knowing that I had already talked to him about my situation. However, he has been ill, and he is not living where he was living at the time that I did talk to him, so I couldn't get in touch with him. I got in touch with him, I think, yesterday, the day before yesterday.

Q How is it you were able to get in touch with him yesterday?

A Through his mother. I saw his mother downtown.

Q Just on the street?

A On the street, right.

Q From February through now, say February 15, or thereabouts, did you have any knowledge as to where Mr. Rich resided or how you might contact him?

A No, I did not.

Q Does he work somewhere or did he work somewhere?

A He did work somewhere, yes, he did, but he is laid off because of an injury.

Q And to your knowledge is he laid off today?

A Yes, he is.

Q How did Mr. Rich get to court today?

A Because I called his sister, you know, I called there at his mother's house and he was there, and she relayed the message, and my father went up and picked him up.

Q Is he present in the courtroom now?

A Not at this moment.

Q Is he right outside waiting?

A Yes, he is.

Q Did you have an address -- do you know what Mr. Rich's address is, at this moment?

A No, I don't know his address, but I know where he lives, let me put it like that. I know it is on Monroe Street.

Q That is his mother's address. Is that right?

A That is correct.

Q Do you know where he lives, at this time?

A No, I don't.

Q What was the problem with Caroline Bellamy?

A Problem?

Q The problem as to why she is not here?

A Number one, I couldn't get her address, her exac address in order for her to be summonsed to court. Also I haven't been in touch with her. Caroline and I had, you know, a relationship.

Q Which is no longer in effect?

A That is right. Like she is not home. She works two jobs and I couldn't get in touch with her.

THE COURT: You say she works two jobs?

THE WITNESS: She works two jobs. I have a home phone number but she is never there. I did try to get in with her.

MS. PERRY: That is all I have, Your Honor. I would note for the court that I also had her telephone number and there was no answer until approximately 10:00 or 10:30 at night, on the efforts that I made, and we had no addresses.

THE COURT: You had a phone number but no address?

MS. PERRY: That is correct, because he didn't kn what it was. I have nothing further.

CROSS EXAMINATION

BY MR. BONSIB:

Q Sir, isn't it a fact you didn't attempt to contac Mr. Rich until today?

A No, it isn't.

Q When did you call him about coming to court today? What is the most recent contact you have had in order to locate him and get him down here right now? You said you called his mother's house?

A It was yesterday.

Q When was the last time you called her house prior to that?

A I can't really say.

Q In fact, when you called his mother's house, his mother was able to get ahold of him. Correct?

A Today?

Q Yes, yesterday.

A His mother wasn't there. It was his sister.

Q That is the same place he was allegedly living, and you took care of him, back in September when this incident occurred. Correct?

A Say that again.

Q She lives at the same place now, on Monroe Street, that she lived back in September?

A Yes.

Q She has the same phone number?

A Right.

Q And you had that phone number?

A Yes, I did, and I also stated that I did know he was there periodically.

Q I have no further questions.

THE COURT: Did you say that his mother, who you called yesterday, has lived at the same address since December?

THE WITNESS: His mother?

THE COURT: Yes.

THE WITNESS: Right.

THE COURT: And you knew where she lived?

THE WITNESS: Yes, I did.

THE COURT: Did you ever go up there?

THE WITNESS: Yes, I did.

THE COURT: How many times did you go up there?

THE WITNESS: Okay. The last time I seen Mr. Rich was, like I think I mentioned, November, if I am not mistaken. That was about the last time.

THE COURT: The last time you saw Mr. Rich -- is it Rich?

THE WITNESS: Yes.

THE COURT: R-i-c-h?

THE WITNESS: R-i-c-h.

THE COURT: You are saying the last time you saw Mr. Rich was in November of 1979?

THE WITNESS: I didn't say that is the last time I saw him. You asked me the last time I went to his house.

THE COURT: The last time you went to his house was

in November of 1979?

THE WITNESS: Yes, to talk about the trial.

THE COURT: That is his mother's house, and his mother still lives there?

THE WITNESS: That is correct.

THE COURT: And you have a phone number for his mother?

THE WITNESS: Yes.

THE COURT: Why didn't you call his mother?

THE WITNESS: I did. Mr. Rich doesn't necessarily stay there.

THE COURT: But his mother knows where he is?

THE WITNESS: Not necessarily.

THE COURT: Do you know that she doesn't?

THE WITNESS: If she did, I assume she would give me a way of contacting Mr. Rich. If she didn't, she would always say she would relay the message, but I never received any return calls.

THE COURT: Anything else?

MS. PERRY: No, sir.

MR. BONSIB: No, sir.

THE COURT: Thank you, sir. You may step down.

(witness excused).

THE COURT: The reason I asked for this testimony is to provide the record with the diligence, if any, exercised

by the defendant in having Mr. Rich here today.

Does anybody want to say anything to me before I make a ruling?

MS. PERRY: I am not quite sure what it is we are doing. I don't want to start beating a dead horse, and incur the rath, or whatever.

THE COURT: What we are doing is, I think it makes a difference about a last minute alibi witness if a defendant suddenly, miraculously comes up with an alibi witness the day of trial, the day before, that is one thing, but if there is an alibi witness the defendant knew about back in November, I have to make a finding as to whether he has been diligent in getting that witness here today. That is what I am going to rule on.

I am not going to rule he has been diligent. I am going to rule he has not been diligent. If you want to say anything about it, I am willing to let you say something to me, or I am just going to rule.

MS. PERRY: If I get past what you want to hear, just stop me.

THE COURT: Go right ahead.

MS. PERRY: Because I feel like I am beating a dead horse. I would refer the court to U. S. versus Myers. It is a 1977 federal case, 550 F.2d, page 1036. It is a Fifth Circuit case that dealt with a failure to disclose where a

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rule required —

THE COURT: Mr. Bailiff, send somebody down, whoever is making all of that noise, and tell them to stop that now.

All right. A little louder.

MS. PERRY: It dealt with the failure of the Government to provide witnesses where the rule required it and the court, in that case, the federal court, provided five factors which ought to be considered in determining whether or not sanctions should be applied, and the one was the amount of prejudice that resulted from the failure to disclose.

Now, I realize this is a reverse situation where state's witnesses in this case were not provided, and in this case, you have a defendant's alibi witness. This is the only standard in a case that I know about. Mr. Bennett was kind enough to help me out in a short recess, and pick this one up. We don't know if there is any prejudice to the state. It had the opportunity to make the calls to find out whether the man really was disabled, and I have provided Mr. Bonsib, for the record, with Mr. Rich's mother's address and telephone number, which I got from Mr. Rich, and his current address and his current telephone number.

THE COURT: You mean just recently?

MS. PERRY: As soon as I knew it, I gave it to him. I also have provided his lawyer's name who is handling his

workmen's comp, his employer, where it was he was injured to establish or to rebut, if he must, that the man was or was not injured. I have given him the names of three doctors under whose care Mr. Rich is, at this particular time. I don't know that there is any prejudice resulting to the state. There is just a distinct possibility there are no skeletons in Mr. Rich's closet, he is just a nice person, and he doesn't have anything bad to be brought out, and that is what I am maintaining.

The second factor is the reason for the non-disclosure. Mr. Taliaferro has testified the reason he talked to him in December about it, and then he was of the opinion that Caroline Bellamy was going to testify, he didn't have an address for Caroline Bellamy. After he spoke with Mr. Rich, Mr. Rich then moved, and he made efforts to find out where it was he lived. He didn't know until toda where Mr. Rich lived. We couldn't have provided that if we had to. It is like saying to the defendant, unless you can provide us with an address for your witness, your alibi witness will never be allowed to testify, because that is what the rule requires, and that is what the court is requiring under the rule.

The third one is the extent to which the harm caused by the non-disclosure was mitigated by subsequent events. I am not sure I know what that means. I am not

sure there was any harm by not providing the name and the address. We have given Mr. Bonsib an opportunity to at least make the telephone calls. He could call the NCIC to find out if there are warrants. He could call to find out if there is a rap sheet. The police will help him with that. I don't know that he hasn't had time to do that.

The fourth factor is the weight of the properly admitted evidence supporting the defendant's guilt. Your Honor, we have a case where this alibi witness is the only witness who can refute that eye witness's testimony, and he is absolutely one hundred percent sure that this is the man who robbed him, so I think that under that fourth factor, the weight of the properly admitted evidence is overwhelming at this point, and that is a factor to be considered. He has no defense without that man.

Other relevant factors arising out of the circumstances of the case is the fifth factor. Your Honor, I think it has got to be more than just not giving the state the name and address. Suppose we don't have it. I don't know that when I gave Caroline Bellamy, that Mr. Bonsib did anything about verifying her. That is all I had was Caroline Bellami. I am also not sure that the state's motion for the discovery is timely under the rules. I haven't checked that. That is why I didn't argue it. I am not sure it is timely, the request for discovery and

inspection of this file. I don't like to argue that because I don't want it pulled on me next week.

In basic fairness in this case, I feel he ought to be allowed to have that man testify for him, or, at least, to give Mr. Bonsib a chance to make his telephone calls. With that information, he has a lot more than I get sometimes with the state's witnesses on its case in chief.

THE COURT: All right. Anything else?

MR. BONSIB: I have nothing else to say, Your Honor. I have said it.

THE COURT: All right, again, the rules of this court established by the Maryland Court of Appeals, to which we are bound, require that the defendant in a criminal case shall disclose the names, addresses, and whatever, of an alibi witness, if that is the defense to the criminal charge.

It appears to me, that if I could have found that the defendant was diligent in his efforts in providing this name and address, and that his diligence just paid off yesterday, that I could then rule that he has done all that the rule requires. However, I can't make that finding. From what I have heard from the way this defendant has testified, he has known the address of the mother of the witness. The mother of the witness still resides at the same address she resided at back in November. It is also obviously very important to this defendant to have this alibi witness here,

probably one of the most important decisions of his life, to have that witness here today. That he should have, because of the seriousness of this charge against this defendant. He waits until two days before the trial to actually locate this witness, when he could have done so early on. He hadn't made any real effort, except yesterday, to locate this witness, and then springs it so to speak on the state the second day of trial, and as I say, I have got an obligation to enforce the rules as they are written. The Court of Appeals has told us they are exact rubrics to be complied with. Be that as it may, I don't think I have any alternative in this case than to stick by my previous ruling that the defendant's alibi witness will not be permitted to testify. I think that we have as complete a record as I can make on this ruling. So in the event I am in error, there wouldn't be any doubt as to why I am right or why I am in error.

Now, have you determined how you want to mask these photographs so that the identification plates won't show?

MS. PERRY: Yes, it has been done to our satisfaction.

THE COURT: Are you agreed that the way it has been done --

MS. PERRY: I wanted to cut them but I don't think that is what the state agreed to do. At least, you can't